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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TRUCK DRIVERS LOCAL 807, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and FRED M. CAPUTO, an individual, *Petitioners*,

v.

NATIONAL LABOR RELATIONS BOARD

and

WELLS FARGO ARMORED SERVICE CORPORATION, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Does 9(b)(3) of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. § 159(b)(3), privilege a guard employer to withdraw recognition from and terminate an established bargaining relationship with its guard employees' collective bargaining representative because that union also admits non-guards to membership or is affiliated with an organization that admits non-guards to membership?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Local 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Fred Caputo, an individual member of Local 807, respectfully petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the judgment in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals is officially reported at 755 F.2d 5, and is reprinted in App. A, pp. 1a-23a. The decision and order of the National

Labor Relations Board is reported at 270 N.L.R.B. No. 106, and is reprinted in App. C, pp. 25a-46a. The decision and recommended order of the Administrative Law Judge is attached to the formal decision of the National Labor Relations Board and is reprinted in App. D, pp. 47a-76a.

JURISDICTION

The decision and judgment of the Court of Appeals for the Second Circuit was entered on February 5, 1985, and is reprinted in App. A, pp. 1a-23a. On March 26, 1985, the Court of Appeals entered an order denying a petition for rehearing and suggestion for rehearing in banc. It is reprinted in App. B, p. 24a. This Court has jurisdiction to review the judgment of the Court below pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Sections 8(a)(5) and 9(b)(3) of the Labor Management Relations Act, 1947, as amended ("the Act"), 29 U.S.C. §§ 158(a)(5) and 159(b)(3). These, and other relevant statutory provisions, are reprinted in App. E, pp. 77a-81a.

STATEMENT OF THE CASE

A. Statement of Facts

Wells Fargo Armored Services Corporation ("Wells Fargo") provides armored car services for the transportation and delivery of monies, securities and other valuables. On July 16, 1984, Teamsters Local 820, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, was certified by the National Labor Relations Board ("the Board") to represent Wells Fargo's employees in a unit including "all chauffeurs, custodians and guards working on trucks in its armored car division." Wells Fargo and Local 820 thereafter maintained a bargaining relationship

and executed a series of collective bargaining agreements. The most recent contract between Wells Fargo and Local 820 was effective from March 14, 1977 to March 16, 1980.

On about June 18, 1979, Wells Fargo was notified that Local 820 had been merged into Local 807, affiliated with the International Brotherhood of Teamsters, and that Local 807 was the successor to all rights and obligations in the 1977-80 collective bargaining agreement. Representatives of Local 807 then met with representatives of Wells Fargo and proceeded to administer the outstanding collective bargaining agreement. Wells Fargo never questioned Local 807's right to represent its employees.

On about February 26, 1980, Local 807 began bargaining with Wells Fargo over the terms of a new agreement. Some fourteen bargaining sessions were held during which time the parties stipulated that the agreement was extended and that all terms agreed upon in a successor agreement would be retroactive to March 17, 1980. On April 11 Wells Fargo made a "final offer" to the Union. On April 13 the Local 807 membership unanimously rejected this "final offer," and a strike ensued.

By letter dated June 2, 1980, Wells Fargo notified Local 807 that effective immediately it was withdrawing the voluntary recognition accorded Local 807 as the collective bargaining representative of its armored car employees. The withdrawal of recognition was based solely on an economic consideration, i.e., the Union's refusal to accept its final contract offer. During June 1980, Wells Fargo made its last contributions into the Local 807 Armored Car Division Pension Fund, a multiemployer trust.

B. Proceedings Below

1. *The Board*

Unfair labor practice charges were filed against Wells Fargo by Local 807 on June 11, 1980, and by Fred M.

Caputo, a Wells Fargo employee, on July 15, 1980. A complaint issued in the consolidated cases on October 21, 1980, alleging that Wells Fargo violated Section 8(a)(5) and (1) of the Act, on or about June 2, 1980, by withdrawing recognition from Local 807.

Wells Fargo denied the allegations, contending that the unit employees were "guards" under § 9(b)(3) of the Act; that Local 807 admits to membership employees other than "guards"; and that Wells Fargo therefore had a right under § 9(b)(3) to terminate its relationship with Local 807 at will.[1] Alternatively, it asserted that a "conflict of loyalties," either actual or potential, arose between the parties and employee-members, thereby permitting Wells Fargo to withdraw recognition from Local 807 under § 9(b)(3).

A nine-day evidentiary hearing was conducted on various dates between April 27, 1981, and January 7, 1982. On March 3, 1982, the Administrative Law Judge ("ALJ") issued his decision. He found that Wells Fargo's withdrawal of recognition violated § 8(a)(5) and (1) of the Act. While § 9(b)(3) prohibits Board certification of a "mixed guard" union (see n.1, *supra*), nothing in that section outlaws voluntary recognition of such a union. Thus, while a guard employer may not be compelled initially to recognize a "mixed guard" union, nevertheless, once having granted such recognition voluntarily, it is estopped from withdrawing recognition.

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[1] Section 9(b)(3) of the Act prohibits the Board from certifying a union to represent a unit of "guards" if that union also admits non-guards to membership, or is affiliated directly or indirectly with an organization which admits non-guards to membership. The Board has termed such a union a "mixed guard" union. Local 807 is indisputably a "mixed-guard" union.

In 1948, the Board held that armored car drivers were not "guards" within the meaning of § 9(b)(3). *Brink's Inc.*, 77 N.L.R.B. 1182. In 1953, it reversed that ruling. *Armored Motor Service Co., Inc.*, 106 N.L.R.B. 1139 (1953)

Exceptions were filed from the Administrative Law Judge's decision, and on May 18, 1984, the Board, with Member Zimmerman dissenting, issued its Decision and Order dismissing the complaint. The Board adopted the ALJ's findings of fact, but disagreed with his conclusion. It held that § 9(b)(3) privileged Wells Fargo to repudiate the bargaining relationship at will upon the expiration of the agreement. Otherwise, it reasoned, the Union could obtain "indirectly—by a bargaining order—what it could not obtain directly—by certification—i.e., it compels the Respondent to bargain with the Union." [App. C, p. 28a]

Because of the purpose of § 9(b)(3)—to shield guard employers from potential divided loyalties if a union represented both guard and non-guard employees—the Board found no basis to distinguish between initial certification and the compulsory maintenance of an established bargaining relationship. "In either case, saddling the employer with an obligation to bargain presents it with . . . the same potential conflict of loyalties that Section 9(b)(3) was designed to avoid." [App. C. p. 32a]

The Board acknowledged that its decision exceeded the literal wording of § 9(b)(3) which prohibits only certification, but concluded that a "too literal reading . . . effectively would thwart" its purpose. [*Id.*, p. 34a] Finally, the Board rejected the theory that Wells Fargo's voluntary recognition estopped it from withdrawing recognition; as the "*intended beneficiary* of the statute" (*id.*, pp. 35a-36a), it was free to assert its rights under § 9(b)(3) and refuse to bargain.

Member Zimmerman dissented from the Board's "novel but untenably expansive construction of Section 9(b)(3)" (*id.*, p. 38a), endorsing the distinction between the Board's creation and maintenance of a bargaining relationship. "The result here is not only far beyond either

the words of Section 9(b)(3) or its legislative history, it envisions a form of collective bargaining that is foreign to the statute as a whole . . . [and] contrary to the stability of collective-bargaining relationships promoted by the statute." [*Id.*, p. 45a]

2. *The Court of Appeals*

On Local 807's petition for review, the Second Circuit Court of Appeals upheld the Board's decision over the dissent of Circuit Judge Mansfield. Recognizing that a guard employer voluntarily can recognize a "mixed guard" union, it nonetheless concluded that the ban on certification and the legislative history of § 9(b)(3) evidenced that Congress disfavored such relationships. "Moreover, it is reasonable to infer . . . that the preclusion of certification portends more than merely a simple check on the Board's power to certify the results of an election." [App. A., p. 10a]

The court rejected the distinction between initial certification and the forced continuation of a voluntary relationship. "There is sufficient support for the Board's conclusion that in enacting the statute, Congress knowingly decreased the stability of bargaining relationships in order to further its objective of protecting employers from the potential for divided loyalty." [*Id.*, p. 11a] Thus, the court rejected the argument that the employer was estopped from refusing to recognize the union, holding that estoppel applies only when dealing with a certifiable union. In its view, the employer's option to recognize the union does not make that option forever binding.

Circuit Judge Mansfield dissented, concluding that the Act does not authorize an employer unilaterally to withdraw recognition of a union with which it has bargained for over 30 years because that labor organization is a "mixed guard" union that now could not be certified. In his view, the majority's decision was "fundamentally un-

fair to the employees" (*id.*, p. 22a), and warned that it would have:

> a profound effect on the stability of collective bargaining relationships in businesses employing guards of many sorts throughout the nation . . . . [T]he Board's action is unfortunate. Its effect is to upset well-established labor relationships by conferring upon employers of such personnel an unfair advantage going beyond the purpose and plain language of the Act. [*Id.*, p. 13a]

Since 9(b)(3) prohibits only certification of a mixed guard union, and "guards" still retain rights as "employees" under the Act, he criticized the majority for rewriting the Act by expanding the certification ban beyond its literal language. Congress, he wrote, refused to make certification a prerequisite to the § 8(a)(5) duty to bargain or to outlaw "mixed-guard" union representation. Thus, he endorsed the distinction between creating an initial relationship and maintaining a relationship created by the parties.

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS BELOW WILL SEVERELY DESTABILIZE EXISTING LABOR RELATIONSHIPS AND REVIEW WILL BE FORECLOSED UNLESS CERTIORARI IS GRANTED

This case involves the collective bargaining rights of employees whom the Board treats as "guards" under § 9(b)(3) of the Act.[2] Section 9(b)(3) performs two functions: it prevents the Board from deciding that a unit is "appropriate" for collective bargaining purposes

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[2] Section 9(b)(3) defines "guard" as "any individual employed . . . to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises." As noted, *supra* n. 1, since 1953 the Board has treated armored car drivers as guards. Petitioners challenge the propriety of that determination but do not seek review of that issue in this case.

if it includes both guards and non-guards; and it provides that "no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards." [App. E, p. 78a]

In this case, there was no question that the bargaining unit was "appropriate," as it included only employees whom the Board treats as "guards," and that Local 807 is a mixed guard union. The question posed in this case of first impression is whether the § 9(b)(3) ban on certification privileges a guard employer to repudiate a long standing bargaining relationship with a "mixed guard" union, at its whim, notwithstanding the general prohibition of such action imposed by § 8(a)(5) of the Act and the overall policy of the Act.

As Circuit Judge Mansfield warned:

> This case of first impression is important since our decision can have a profound effect on the stability of collective bargaining relationships in businesses employing guards of many sorts throughout the nation (including plant guards, contract guards, armored car drivers and guards, couriers and deliverymen), who are represented by mixed-guard unions of their own choosing. . . . [T]he Board's action . . . is unfortunate. Its effect is to upset well-established labor relationships by conferring upon employers of such personnel an unfair advantage going beyond the purpose and plain language of the Act. [App. A at 13a.]

The implications of this case are far-reaching, potentially affecting many thousands of guards who are represented by mixed guard unions. Based on its victory against Local 807, Wells Fargo no doubt will attempt to rid itself of its bargaining relationships with Teamster local unions throughout its system. Its competitors may

follow suit,[3] and guard employers of all sorts will be free to terminate their bargaining relationships at their whim. Their employees will be deprived of the benefits of union representation, including valuable health coverage and pension rights, which they have enjoyed in some cases for decades.

Since the Board validated this conduct it will recur. Yet, the Board's General Counsel will not issue future complaints. She has already exercised her discretion in refusing to issue complaints in several similar cases (*supra*, n. 3) based on the Board's decision here, and her discretion is unreviewable. § 3(d) of the Act, 29 U.S.C. § 153(d). *See, e.g., United Electrical Contractors Ass'n* v. *Ordman*, 366 F.2d 776 (2nd Cir. 1966), *cert. denied*, 385 U.S. 1026 (1967). Therefore, no other court of appeals will have an opportunity to address this issue, and no other case will come to this Court presenting the issue.

Unless certiorari is granted, the law will be frozen in its current posture, with no further chance for review. In that event, "mixed guard" unions will have lost any chance to salvage representational rights for thousands of employees. The absence of a conflict among the circuits on this precise § 9(b)(3) issue is, in our view, not

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[3] Even in anticipation of the Board's decision here, several armored car companies in locations around the country had followed Wells Fargo's example. After the decision in this case issued, the Board's General Counsel refused to issue complaints over such conduct based on the Board's decision. Local 807 alone had three such cases: *Brink's Inc.*, NLRB Case No. 2-CA-20171, charge dismissed May 31, 1984; *Purolator Armored Car*, Case No. 29-CA-11010, charge dismissed June 13, 1984; *Brink's, Inc., Air Courier Div.*, Case No. 2-CA-20181, charge dismissed May 31, 1984. On May 31, 1984, the General Counsel decided to dismiss charges filed in at least three other cases by Teamsters Local Unions over withdrawals of recognition. *Armored Motor Transport of California, Inc.*, Case No. 32-CA-5758; *United Courier Inc.*, Case No. 32-CA-6291; and *Gelco Express Corp.*, Case No. 32-CA-6380.

a sufficient reason for the Court to deny certiorari, in light of the importance of the question presented to the administration of the Act, and the conflict of the decision below with the language, policy and legislative history of the statute and with decisions of this Court. Certainly, the extensive dissenting opinions in this case evidence a split of judgment on this issue.

II. THE DECISIONS BELOW ARE FUNDAMENTALLY INCONSISTENT WITH THE LANGUAGE AND STRUCTURE OF THE ACT AND WITH DECISIONS OF THIS COURT

A. The Decisions Below Exceed The Narrow Language of § 9(b)(3)

Section 9(b)(3) was enacted in 1947 as part of the Taft-Hartley amendments to the National Labor Relations Act in order to deal with a very specific and limited problem. The section was triggered by the reasoning of the Sixth Circuit Court of Appeals in *NLRB* v. *Jones & Laughlin Steel Corporation*, 154 F.2d 932 (6th Cir. 1946). Though it was later reversed by this Court (331 U.S. 416 (1947)), the court held that while militarized plant guards were "employees" under the Act, if they were represented by the same union as the general plant employees, a conflict might arise when the guards were required to protect the employer's property and personnel.[4] If strikes or industrial unrest occurred involving production employees, the plant guards' obligations, to enforce rules or regulations they were hired to enforce, would conflict with their obligation to their union which, as the representative of production employees, had authorized and directed the strike.

While Congress was debating the 1947 Taft-Hartley amendments, the Supreme Court reversed the Sixth Circuit. The House responded by proposing to exclude from

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[4] *See also NLRB* v. *Atkins & Co.*, 155 F.2d 567 (7th Cir. 1946), *revd.*, 331 U.S. 398 (1947).

the Act's coverage individuals employed in "police . . . matters." [5] The House Report justified this exclusion by pointing to the need of management to have "faithful agents" without the risk of divided loyalty, stating that "plant policemen and guards prevent disorder and report misconduct of employees and of unions and their members." [6]

The Senate Bill included guards within the Act's coverage. The resulting compromise, Section 9(b)(3) of the Labor-Management Relations Act, was drafted in conference. As stated, the Section performs two functions. While a unit composed of guards and non-guards is inappropriate for any purpose, a unit composed solely of guards is appropriate. The only limitation is that a mixed guard union cannot be *certified* to represent such a unit. *William J. Burns Intl. Detective Agency*, 134 N.L.R.B. 451, 452 (1961) ("The distinction implicit in the language bears careful note"). Quite clearly, however, "[u]nder the language of clause (3), guards still retain their rights as employees under the National Labor Relations Act. . . ." [7]

Nothing in § 9(b)(3) prohibits voluntary recognition of a "mixed guard" union or membership in such a union. "[W]hile the statute forecloses certification by the Board of a disqualified union, it does not deprive the guards of the right granted under Section 7 'to bargain collectively through representatives of their own choosing.'" *Rock-Hill-Uris, Inc.* v. *McLeod*, 236 F. Supp. 395, 398 (S.D.N.Y. 1964), *affd.*, 344 F.2d 697 (2d Cir. 1965).

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[5] H.R. 3020, 80th Cong., 1st Sess. (1947), Sec. 2(12)(b), I NLRB, Legislative History of the Labor Management Relations Act of 1947, p. 41.

[6] See, House Report No. 245, 80th Cong., 1st Sess. 16 (1947), I NLRB, Legis. Hist. LMRA, 1947, p. 307.

[7] 93 Cong. Rec. 6601, 80th Cong., 1st Sess. (1947), II NLRB, Legis. Hist. LMRA, 1947, p. 1541.

See also Teamsters Local 344 v. *NLRB*, 568 F.2d 12, 20 (7th Cir. 1978); *NLRB* v. *Bel-Air Mart, Inc.*, 497 F.2d 322 (4th Cir. 1974); *NLRB* v. *White Superior Div., White Motor Corp.*, 404 F.2d 1100 (6th Cir. 1968).

While the Board has defined "guard" more expansively than the plain language of the statute requires,[8] it nonetheless, up until this case, has compelled guard employers to honor their employees' statutory rights. The decision in this case deviates from that approach, and the result clearly exceeds the limited language of § 9 (b) (3). As Circuit Judge Mansfield stated, the "majority seeks to rewrite the Act . . . relying on its own *ipse dixit* that 'it is reasonable to infer . . . that the preclusion of certification portends more than merely a simple check on the Board's power to certify the results of an election.' . . . Nothing in the statutory language or decisions under the statute supports that broad statement." [App. A, p. 19a-20a] [9]

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[8] *See generally* Steven H. Kahn, "The NLRB's Misinterpretation of the Guard Provision," *Labor Law Journal* (June 1984). The Board first held that § 9(b) (3) was limited to plant guards employed to protect property of their own employer, because of the potential conflict they might face in enforcing rules against coworkers who were members of the same union. *Brink's Inc.*, 77 N.L.R.B. 1182 (1948). Then, the definition was extended to employees functioning as plant guards, but employed under contract to perform guard services for customers of their employer. *American District Tel. Co.*, 83 N.L.R.B. 517 (1949). In 1953, the Board went further to hold that armored car drivers were guards. *Armored Motor Service Co.*, 106 N.L.R.B. 1139. And, in 1976, unarmed couriers employed by express delivery services were held to be guards. *Brink's Inc.*, 226 N.L.R.B. 1182. One jurist has stated that the Board's expansive definition "would even apply to delivery - men." *Teamsters Local 71* v. *NLRB*, 553 F.2d 1368, 1378 n.3 (D.C. Cir. 1977) (Bazelon, C.J., dissenting).

[9] "In view of the scalpel-like precision with which Congress, after much debate, chose its compromising language, we should adhere to its plain unambiguous terms. *See e.g., Garcia* v. *United States*, 105 S. Ct. 479 (1984) (when court finds the terms of a statute un-

B. The Decisions Below Contravene the Plain Language of § 8(a)(5) and Conflict With Decisions Of This Court

Nothing in the language of the statute makes certification a prerequisite to the duty to bargain under § 8(a)(5). *NLRB* v. *Gissel Packing Co.*, 395 U.S 575 (1969). While § 9(b)(3) prevents the Board from compelling a guard employer to recognize a "mixed guard" union *de novo*, there is no statutory language barring the compulsory maintenance, under § 8(a)(5) of the Act, of an established relationship with an uncertifiable union. The general design of the Taft-Hartley amendments supports this distinction.

The House passed a bill which sought to amend § 8(5) of the National Labor Relations Act (the Wagner Act) so as to permit the Board to find a violation of the duty to bargain only where the employer had failed to bargain with a union "currently recognized by the employer or certified as such under Section 9." § 8(a)(5) of H.R. 3020, 80th Cong., 1st Sess. (1947), I Legis. Hist. LMRA, 1947, p. 178. The House Report reveals that this proposal was expressly intended to place recognition of an uncertified union wholly at the option of the employer. House Report No. 245 on H.R. 3020, p. 30, I Legis. Hist. LMRA, 1947, p. 321.

The proposal was rejected in Conference. H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 41, I Legis. Hist. LMRA, 1947, p. 545. Instead, the Conference accepted the Senate bill version which retained the language of § 8(5) of the Wagner Act. I Legis. Hist. LMRA, 1947, p. 511. Thus, it remained an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees *subject to the provisions*

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ambiguous, its inquiry is complete, except in 'rare and exceptional circumstances') (quoting *Crooks* v. *Harrelson*, 282 U.S. 55, 60 (1930))." [App. A. p. 19a, Mansfield, dissenting]

of section 9(a)" (emphasis added). Congress refused to foist upon § 8(a)(5) a prerequisite of certification under § 9(c) of the Act, 29 U.S.C. § 159(c). The only requirement was that of § 9(a), that the representative invoking the bargaining obligation be "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes. . . ." 29 U.S.C. § 159(a).

Notwithstanding this history, the Second Circuit majority ruled that certifiability was a prerequisite to this § 8(a)(5) refusal to bargain violation. It noted as follows:

> Section 8(a)(5) is silent as to whether a union must be certifiable in order to invoke its protections. A suggested amendment, providing that only currently recognized or certified unions could bring unfair labor practice complaints against an employer charging a refusal to bargain, Legislative History, *supra* at 321, was not adopted in conference. *Id.* at 1538. The refusal to require certification as a standing prerequisite for bringing complaints under Section 8(a)(5) does not support Local 807's arguments as to Section 9(b)(3). Congress' refusal may mean that *uncertified* unions which may be eligible for certification have rights under Section 8(a)(5), but it does not necessarily follow that *uncertifiable* unions have the same rights. [App. A. p. 10a]

This conclusion directly conflicts with this Court's decision in *United Mine Workers* v. *Arkansas Oak Flooring*, 351 U.S. 62 (1956). In that case, this Court discussed an employer's duty to bargain under § 8(a)(5) with a union which failed to comply with the provisions of § 9(f), (g) and (h) of the Act (repealed in 1959).[10] Like § 9(b)(3), those sections were enacted by the Taft-Hartley amendments. They required unions to file with

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[10] 29 U.S.C. § 159(f), (g) and (h), 61 Stat. 145-146, as amended, 65 Stat. 602 (repealed in 1959) (reprinted in App. E, pp. 79a-81a).

the Secretary of Labor reports containing financial and organizational data and, with the Board, affidavits of non-communist affiliation. Non-complying unions, like "mixed guard" unions, could not receive Board certification. But, in addition, a non-complying union was barred from invoking the Board's processes either in unfair labor practice proceedings or representation cases. This Court held quite clearly that the duty to bargain with a non-complying union nonetheless exists, subject only to the provisions of section 9(a). As it held:

> Section 8(a)(5) declares it to be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, *subject to the provisions of section 9(a).*" (Emphasis supplied.) Section 9(a) which deals expressly with employee representation, says nothing as to how the employees' representative shall be chosen . . . It does not make it a condition that the representative shall have complied with § 9(f), (g) and (h) or shall be certified by the Board, *or even be eligible for such certification.* [351 U.S. at 71-72 (emphasis added).]
>
> * * *
>
> Subsections (f), (g) and (h) of section 9 merely describe the advantages that may be gained by compliance with their conditions. The very specificity of the advantages to be gained and the express provision for the loss of these advantages imply that no consequences other than those so listed shall result from non-compliance. [*Id.* at 73]

This analysis was reaffirmed in *NLRB* v. *District 50, United Mine Workers*, 355 U.S. 453 (1958). Of similar effect, "certification gives an organization which achieves it additional rights not all its rights." *NLRB* v. *White Superior Div.*, 404 F.2d at 1103 n.5. Under the Wagner Act, certification entailed few, if any, advantages over voluntary recognition. However, as this Court noted in *Gissel Packing*, 395 U.S. 598-99, under the 1947 amendments:

> [a] certified union has the benefit of numerous special privileges which are not accorded unions recognized voluntarily or under a bargaining order [14] and which, Congress could determine, should not be dispensed unless a union has survived the crucible of a secret ballot election.

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[14] E.g., protection against the filing of new election petitions by rival unions or employees seeking decertification for 12 months (§ 9(c)(3)), protection for a reasonable period, usually one year, against any disruption of the bargaining relationship because of claims that the union no longer represents a majority . . ., protection against recognitional picketing by rival unions § 8(b)(4)(C)), and freedom from the restrictions placed in work assignment disputes by § 8(b)(4)(D), and on recognitional and organizational picketing by § 8(b)(7).

In putting together the final version of the Act in 1947, the Conference drafted § 9(b)(3) as a compromise and at the same time rejected certification as a prerequisite to a § 8(a)(5) violation. The amendments also rendered Board certification more meaningful, reserving its special benefits to unions whose status had been tested in a secret ballot election.[11] By conditioning an employer's duty to bargain with a union on its certifiability, the Second Circuit attributed far too much to certification, much more than Congress intended. Surely Congress fashioned the certification ban in tandem with the special advantages its amendments attached to certification. Had Congress wanted to do more than simply deny "mixed-guard" unions the enumerated advantages of a certification, it could have inserted express language in the statute to accomplish that result.[12]

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[11] The 1947 amendments also made a Board-conducted election the sole basis for achieving certification. Section 9(c) of the Wagner Act had provided for Board certification after elections or "any other suitable method to ascertain [the employees'] representatives." I NLRB, Legislative History of the National Labor Relations Act of 1935, p. 3274.

[12] "[W]hen Congress wished to disqualify a union not only from certification but, more broadly, from resort to the Board for the

Nothing in the statutory language or legislative history supports the result reached in this case. These decisions therefore warrant review by this Court. Otherwise the Board, under the guise of administration of the Act, will have obliterated important employee rights by putting limitations in the statute not placed there by Congress, achieving that which Congress refused to enact into law.

III. THE DECISIONS BELOW THWART THE STATUTORY POLICY TO PROMOTE STABILITY IN LABOR-MANAGEMENT RELATIONSHIPS AND CONFLICT WITH THE APPROACH OF THE THIRD CIRCUIT COURT OF APPEALS

The Board and the Second Circuit justified their departure from the plain language of the statute on the purpose of § 9(b)(3) to shield guard employers from any potential conflict of loyalties problem. The result, however, is that this shield has become a Sword of Damocles, ever threatening to extinguish employees' collective bargaining rights and to destabilize labor relations in entire industries. Destroying statutory rights merely to protect an employer from some speculative and highly unlikely conflict of loyalties distorts the language of § 9(b)(3) and exalts it over the general statutory design and policy.[13]

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protection of existing bargaining relationships, Congress well knew how to achieve that end." Thus, § 9(f), (g) and (h) "not only disqualified non-complying unions from having their [representation] petitions processed, they further, and specifically, provided that their charges could not result in complaints." [App. C. at 40a, Zimmerman dissent] As discussed, however, even in the case of § 9(f), (g) and (h), compliance was not a prerequisite to an employer's obligation to bargain (*Arkansas Oak Flooring*, 351 U.S. 62; *NLRB* v. *District 50, United Mine Workers*, 355 U.S. 453), merely to the union's filing an unfair labor practice charge.

Section 9(b)(3), by contrast, contains no preclusion on a mixed guard union filing a charge. Nor does it make a unit composed exclusively of guards inappropriate if it is represented by a mixed guard union. Congress could have so provided, but it did not.

[13] It is clear that the withdrawal of recognition here was totally unrelated to security or divided loyalties problems. The Board adopted the Administrative Law Judge's findings that economic

The Act's chief purpose is to encourage stable labor relationships. In furtherance of that purpose, it is general Board policy that an employer who has voluntarily recognized a union must maintain that relationship, absent a good faith doubt of the union's majority status. An employer has a right, absent the commission of unfair labor practices, to insist on a Board conducted election before recognizing a union. *Linden Lumber Division* v. *NLRB*, 419 U.S. 301 (1974). But, once it voluntarily recognizes a majority union, no matter how informally, the right is lost. "[O]nce an employer has affirmatively agreed to recognize a union, it cannot change its mind." *NLRB* v. *Brown & Connolly, Inc.*, 593 F.2d 1373, 1374 (1st Cir. 1979). Once a voluntary bargaining relationship is established, it "must be permitted to continue and recognition may not be withdrawn at will." *NLRB* v. *A. Lasaponara & Sons, Inc.*, 541 F.2d 992 (2d Cir. 1976), *cert. denied*, 430 U.S. 914 (1977). Moreover, "[v]oluntary recognition is a favored element of national labor policy." *NLRB* v. *Broadmoor Lumber Co.*, 578 F.2d 238, 241 (9th Cir. 1978).

In accordance with these principles, the Administrative Law Judge and the dissenting Board Member and Circuit Judge all reasoned that a guard employer, having voluntarily entered into a bargaining relationship with a mixed guard union, was estopped from repudiating that relationship. By contrast, the Second Circuit upheld the Board in rejecting that approach, elevating the narrow purpose of § 9(b)(3) over the overall purpose of the Act. Its decision conflicts with the Third Circuit Court of Appeal's approach in an analogous situation.

The Third Circuit ordered a voluntary bargaining relationship to be maintained under § 8(a)(5) even where

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reasons, and not divided loyalties, prompted Wells Fargo's withdrawal of recognition of Local 807, and that over the last 30 years, Wells Fargo's employees had experienced no actual or potential conflict of loyalties.

the Board could not have certified the union because of the provisions of § 9(b)(1) of the Act. 29 U.S.C. § 159(b)(1). *International Telegraph and Telephone Corp.* v. *NLRB*, 382 F.2d 366 (1967), *cert. denied*, 389 U.S. 1039 (1968). That section, also enacted contemporaneously with § 9(b)(3), prevents the Board from deciding that a unit is appropriate if it includes both professional and non-professional employees, unless the professional employees have voted for inclusion in such a unit. [App. E, p. 77a-78a] In *ITT*, the Board in 1951 had improperly certified a professional and non-professional unit without holding a self-determination election. In 1958 this Court, in *Leedom* v. *Kyne*, 358 U.S. 184, held that such a certification would be illegal. Nonetheless, even after that, the parties maintained the relationship voluntarily until 1964 when, after a strike, the employer withdrew recognition.

The Third Circuit upheld the Board's decision that the employer had unlawfully withdrawn recognition, despite the fact that the original certification may have violated § 9(b)(1). It stated that nothing in § 9(b)(1) prohibits the parties from maintaining and recognizing such a unit consensually, and the parties had done so for many years, even after notice that the original certification was made in error. 382 F.2d at 370.

In *NLRB* v. *Cardox Div. of Chemetron Corp.*, 699 F.2d 148, 154-55 (1983) the Third Circuit reaffirmed its *ITT* reasoning, emphasizing that the bargaining unit in question there was not "inherently inappropriate." Even though the Board validly could not have created it, the parties voluntarily could agree to it, as they did. In those circumstances, the employer was estopped from repudiating the relationship. In *Cardox*, the Third Circuit decided that the sole prerequisite for a § 8(a)(5) refusal to bargain violation in a voluntary recognition case is that the bargaining *unit* not be totally inconsistent with the Act. For example, in *Supreme Sugar Company*, 258

N.L.R.B. 243, 245 (1981), where the *unit* contained both guards and non-guards, the Board dismissed a § 8(a)(5) charge. 699 F.2d at 155-56.

In the case of guards, the Act's only appropriate unit requirement is that it not include both guards and non-guards. The certification ban of § 9(b)(3) has no bearing on the appropriate *unit* question. *See Burns*, 134 N.L.R.B. at 452. Indisputably, the unit at issue here is appropriate and not inconsistent with the Act. Under the Third Circuit's approach, Wells Fargo, having maintained a voluntarily created relationship with a "mixed guard" union in an appropriate unit for over 30 years, would have been estopped to repudiate it.

Obviously, the Third Circuit's approach better furthers the Act's policy to encourage stable labor relations. Review of this case is warranted in order to resolve this difference of approach and to restore a proper balance between the conflicting purposes of § 9(b)(3) and of the Act as a whole. Absent review, far-reaching destabilization in labor relationships may result.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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84-1996

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TRUCK DRIVERS LOCAL 807, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and FRED M. CAPUTO, an individual,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD

and

WELLS FARGO ARMORED SERVICE CORPORATION,

Respondents.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 162 August Term 1984

Argued: October 11, 1984 Decided: February 5, 1985

Docket No. 84-4083

TRUCK DRIVERS LOCAL UNION NO. 807, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and FRED M. CAPUTO, an Individual,

Petitioners,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

WELLS FARGO ARMORED SERVICE CORPORATION,

Intervenor.

Before: MANSFIELD and KEARSE, *Circuit Judges*, and METZNER, *Senior District Judge.**

Petition to review an order of the National Labor Relations Board dismissing an unfair labor practice complaint against intervenor Wells Fargo Armored Service Corporation.

---

* Hon. Charles M. Metzner, of the United States District Court for the Southern District of New York, sitting by designation.

Petition dismissed. Judge Mansfield dissents in a separate opinion.

APPEARANCES:

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Robert M. Baptiste and Wilma B. Liebman, Washington, D.C., *for amicus curiae International Brotherhood of Teamsters.*

Lester Asher and Stephen B. Rubin, Chicago, Illinois (Asher, Pavalon, Gittler & Greenfield, Ltd., Chicago, Illinois), *for amicus curiae Service Employees International Union, AFL-CIO, CLC.*

METZNER, Senior District Judge:

Petitioner Truck Drivers Local Union No. 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 807") seeks review of a decision and order of the National Labor Relations Board ("the Board") dismissing an unfair labor practice complaint against intervenor Wells Fargo Armored Services Corporation ("Wells Fargo"). 270 N.L.R.B. No. 106 (May 18, 1984).

At issue is the validity of the Board's determination that under Section 9(b)(3) of the Labor Management Relations Act ("Act"), 29 U.S.C. § 159(b)(3), Wells Fargo was privileged, following the expiration of its collective bargaining agreement with Local 807, to withdraw voluntary recognition of Local 807 because of that union's status as a mixed guard union.

We find that the Board's interpretation of Section 9(b)(3) was reasonable. The petition for review of the Board's decision is dismissed.

BACKGROUND

Wells Fargo, an armored car service incorporated in Delaware, transports and delivers money, securities and other valuables for banks and commercial customers. The company operates two facilities in the New York area which employ approximately 93 persons as guards on a full or part-time basis. From 1948 until June 18, 1979, the two New York facilities maintained a collective bargaining relationship with Local 820 of the Teamsters. Local 820's membership and leadership consisted exclusively of guards employed in the armored car industry. Local 820 was nonetheless a nonqualified union under Section 9(b)(3) because although it did not admit any nonguards to membership, it was affiliated directly with the Teamsters, who do admit to membership employees other than guards. Such a union will hereinafter be referred to as a mixed guard union. The last collective bargaining agreement between Local 820 and Wells Fargo was effective through March 16, 1980.

On June 18, 1979, Local 807, a much larger Teamsters local that admitted both guards and nonguards to its membership, notified Wells Fargo that by directive of the Teamsters' general executive board Local 820 had been merged into Local 807. Wells Fargo recognized the union pursuant to a successorship clause in the bargaining agreement with Local 820. Over the course of the

remaining months of that agreement, Wells Fargo and Local 807 both proceeded in a manner consistent with full recognition.

As the expiration of the bargaining agreement drew near, Local 807 and Wells Fargo held numerous bargaining sessions in an effort to reach a new agreement. The existing agreement was twice extended to facilitate further negotiations. Wells Fargo, however, was unable to obtain certain economic and security-related concessions which it considered to be essential, and therefore made a final offer which was forthwith rejected by Local 807's membership. A strike commenced on April 14, 1980. Several further negotiating sessions proved unsuccessful in breaking the impasse. There is no evidence that Wells Fargo bargained in bad faith.

On June 2, 1980, while the strike was still in progress, Wells Fargo sent a letter to Local 807 which stated that as of that date Wells Fargo was "withdrawing the voluntary recognition accorded Local 807 IBT as collective bargaining representative of the armored car guard employees" at the two New York area facilities. Wells Fargo gave no notice prior to this letter of its intention to withdraw recognition.

Local 807 and one of its members, Fred Caputo, each subsequently filed unfair labor practice complaints against Wells Fargo charging violation of Section 8(a)(5) of the Act because of the refusal of Wells Fargo to bargain collectively with a representative of its employees. After the Board issued a consolidated complaint on the charges of Local 807 and Caputo, an administrative law judge ("ALJ") held hearings on the matter and issued an opinion in which he concluded that Wells Fargo's withdrawal of recognition was in derogation of its obligation under Section 8(a)(5) of the Act to bargain with the union. He reasoned that the voluntary recognition of Local 807 by Wells Fargo estopped it from withdrawing that recognition under the existing circumstances. The ALJ also

found that Wells Fargo's decision to withdraw recognition was based solely on economic considerations and that any concerns about potential conflicts of interest testified to at the hearing were mere afterthoughts. Finally, the ALJ found that although Section 9(b)(3) of the Act precluded certification of Local 807, it did not bar the Board from issuing an order compelling the maintenance of a bargaining relationship voluntarily established.

The Board, by a vote of 3-1, reversed the ALJ and dismissed the consolidated complaint. It held that the congressional purpose in enacting Section 9(b)(3) was so overarching as to privilege Wells Fargo in the circumstances of this case to withdraw recognition from the union regardless of whether its present motivation was merely economic.

DISCUSSION

This is a case of first impression involving the effect of a prior voluntary recognition on an employer's privilege under Section 9(b)(3) of the Act to refuse to recognize and bargain with a mixed guard union. We decide it within a well-established framework of case law and Board decisions on related issues.

At the outset we note the limited review of Board decisions provided for by Section 10(f) of the Act. Under this provision courts have generally accorded great respect to the expertise of the Board when its conclusions are rationally based. *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). Indeed, the Supreme Court has made it clear that if the Board's construction of a statute is reasonably defensible, it should not be rejected merely because a court might prefer another construction. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979). The Board's interpretation should be disturbed only if it is " 'fundamentally inconsistent with the structure of the Act' and an attempt to usurp 'major decisions properly made by Congress.' " *Id.* (quoting *American Shipbuilding Co. v. NLRB*, 380 U.S. 300, 318 (1965)).

Section 9(b)(3) of the Act was passed by Congress in 1947 as part of the Taft-Hartley Act. The section provides, in relevant part, that

> "[T]he Board shall not
>
> (3) decide that any unit is appropriate for such purposes [collective bargaining] if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."

The section performs two functions. The first clause limits the organizational rights of guards—they must be in units segregated from nonguard employees. The second clause, the one at issue here, denies mixed guard unions the right to be certified as a representative of a unit of guards. *See, e.g., International Harvester*, 145 N.L.R.B. 1747 (1964); *Schenley Distilleries*, 77 N.L.R.B. 468 (1948). Local 807 argues that there is a distinction between the two clauses: on the one hand, a mixed guard "unit" is inappropriate for any purpose; on the other hand, a mixed guard "union" cannot be certified to represent a proper unit but is not in and of itself inappropriate for all purposes. We shall discuss this distinction later, but for now turn to the parameters of the provision governing mixed guard unions.

It is clear that in light of Section 9(b)(3) the Board cannot compel an employer to recognize in the first instance a mixed guard union as the bargaining agent for its unit of guards. *NLRB v. White Superior Div., White Motor Corp.*, 404 F.2d 1100, 1103 (6th Cir. 1968). *See*

also Teamsters Local 344 v. NLRB, 568 F.2d 12 (7th Cir. 1978); *City National Bank and Trust Co.*, 76 N.L.R.B. 213 (1948). It is equally clear, however, that under Section 9(b)(3) an employer may voluntarily recognize a mixed guard union as the bargaining agent for a unit of guards. *White Motor Corp.*, 404 F.2d at 1103 (employer may, if it wishes, recognize such a union, but absent such consent employer may not be compelled, directly or indirectly, to recognize the union).

We turn to the legislative history of Section 9(b)(3) for guidance in determining whether the policy behind the section requires or precludes the issuance of the "bargaining order" sought by Local 807.

This legislative history, 93 Cong. Rec. 6444, *reprinted in* II NLRB, Legislative History of the Labor Management Relations Act, 1947, at 1541, 1581 (1948) ("Legislative History") (statement of Sen. Taft), shows that the section was a direct reaction to the Supreme Court's decisions in *NLRB v. Jones & Laughlin Steel Corp.*, 331 U.S. 416 (1947), and *NLRB v. E. C. Atkins & Co.*, 331 U.S. 398 (1947), which enforced Board orders requiring an employer to bargain regarding a unit of its plant guards with the same union that represented the employer's production and maintenance employees. Each house of Congress drafted language as a response to the Supreme Court holding: the House bill excluded guards entirely from the protections of the Act; the Senate bill included them. The conference adopted the present language as a compromise so that guards could retain rights as employees under the Act. The conference chose the language, it said, because it found persuasive the exposition by the lower court in *Jones & Laughlin* (154 F.2d 932 (6th Cir. 1946)) that guards who belong to a union representing plant employees would experience conflicting loyalties in the event of a strike because their obligation to the employer and the community would be incompatible with their obligation to the striking union.

The legislative history indicates as well that the conference was impressed by the dissenting views of Board Member Reynolds in such cases as *Monsanto Chemical Co.*, 71 N.L.R.B. 11 (1946), wherein he argued that the Board has a duty to decline the use of its processes in order to avoid encouraging the creation of relationships which are incompatible with the Act and are inherently unsound labor practices. Legislative History, *supra* at 1541. Senator Taft further stated that "as to plant guards we provided that they could have the protection of the Wagner Act only if they had a union separate and apart from the union of the general employees." *Id.* at 1544.

Senator Murray, speaking in opposition to the proposed legislation, stated that "the conferees have adopted a new rule with respect to . . . guards . . . denying them rights under present legislation." Legislative History, *supra* at 1572. In analyzing the impact of the legislation, Senator Murray further stated that "[t]he restriction on Board discretion with respect to . . . guards would require the Board wholly to ignore existing and satisfactory bargaining patterns . . . . *Id.* at 1581.

The Board and reviewing courts have consistently found that although in enacting Section 9(b)(3) Congress may have focused primarily on the particular situation in *Jones & Laughlin*, the broad language which it chose to use encompasses not merely divided loyalties at a company plant, but the potential for divided loyalty that arises when a guard is called upon to enforce the rules of his employer against any fellow union member. *Teamsters Local 71 v. NLRB*, 553 F.2d 1368, 1373 (D.C. Cir. 1977).

It has been held uniformly in the last thirty years, for example, that armored car security personnel, like those employed by Wells Fargo, are guards within the meaning of Section 9(b)(3). In *Teamsters Local 851 v. NLRB*, 732 F.2d 43 (2d Cir. 1984), the court found

courier drivers to be guards and noted that the Board's consistent interpretation of the statutory term to encompass more than plant guards comports with the statutory and the legislative history. The potential for divided loyalty is present whether or not the same employer is involved. *NLRB v. American Dist. Tel. Co.*, 205 F.2d 86 (3d Cir. 1953); *Armored Motor Services Co., Inc.*, 106 N.L.R.B. 1139 (1953) (potential for conflict of loyalty, though not so far-reaching as in plant situation, nevertheless present among armored car guards). Since 1953 the Board has consistently refused to overule *Armored Motor Services Co. See Teamsters Local 344 (Purolctor Security, Inc.)* 228 N.L.R.B. 1379 (1977), *enforced*, 568 F.2d 12 (7th Cir. 1978); *Teamsters Local 639 (Dunbar Armored Express, Inc.)*, 211 N.L.R.B. 687 (1974).

Local 807 and amici argue that even though armored car security personnel are guards for purposes of Section 9(b)(3), that section is merely a narrow exception to the general thrust of the Act and therefore should not be expanded to allow for the unilateral termination of consensual bargaining relationships. In their view, the potential conflict of loyalty with which Congress was concerned is, at least in the armored car industry, speculative at best. In any event, forced continuation of a relationship voluntarily initiated, they argue, is fundamentally different from forced recognition at the outset of a relationship. In their view an employer cannot have two bites at the apple; once it recognizes a mixed guard union, it must continue to bargain unless it has a good faith doubt of the union's continued majority status. This is the standard applicable to a collective bargaining relationship with a certified union. To hold otherwise, they argue, would be inconsistent with the Act's primary concern for stability in bargaining relationships.

The fact that Congress expressly precluded the Board from certifying a mixed guard union as the representa-

tive of a unit of guards, however, is certainly evidence that Congress disfavored such relationships.[1] Moreover, it is reasonable to infer from the statutory language and the decisions under it that the preclusion of certification portends more than merely a simple check on the Board's power to certify the results of an election. *See, e.g., Teamsters Local 71 v. NLRB*, 553 F.2d 1368, 1376 (D.C. Cir. 1977), in which the court stated that the "agency reasonably could conclude that an organization falling within the limitations stated in Section 9(b)(3) should not be allowed to invoke the Board's processes." The courts have recognized that although members of a mixed guard union have certain rights under the Act, "the policy of § 9(b)(3) dictates that such membership not bestow all the benefits normally associated with belonging to a labor organization." *White Motor Corp.*, 404 F.2d at 1104. *See also NLRB v. Bel-Air Mart, Inc.*, 497 F.2d 322, 328 (4th Cir. 1974). The proscription against certification of mixed guard unions therefore means that there is little sense in an employee remaining a member of such a union. A guard can adequately protect his rights, however, by joining a union separate from that of other employees.

We are convinced that, based on the language and legislative history of Section 9(b)(3), the Board was warranted in interpreting the section as proscribing

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[1] Section 8(a)(5) is silent as to whether a union must be certifiable in order to invoke its protections. A suggested amendment, providing that only currently recognized or certified unions could bring unfair labor practice complaints against an employer charging a refusal to bargain, Legislative History, *supra* at 321, was not adopted by the conference. *Id.* at 1538. The refusal to require certification as a standing prerequisite for bringing complaints under Section 8(a)(5) does not support Local 807's arguments as to Section 9(b)(3). Congress' refusal may mean that *uncertified* unions which may be eligible for certification have rights under Section 8(a)(5), but it does not necessarily follow that *uncertifiable* unions have the same rights.

Board direction to an employer to bargain with a mixed guard union despite prior voluntary recognition of that union by the employer. There is sufficient support for the Board's conclusion that in enacting the statute, Congress knowingly decreased the stability of bargaining relationships in order to further its objective of protecting employers from the potential for divided loyalty. In view of this, we find no reasoned basis for a distinction between initial certification and compulsory maintenance of a voluntary relationship. A voluntary grant of recognition cannot change the substance of Section 9(b)(3).

The difference in the language Congress chose in discussing mixed guard units and mixed guard unions does not change our analysis. An employer who voluntarily recognizes a mixed guard union may not discontinue the relationship during the contract period. *Burns Int'l Detective Agency, Inc.*, 134 N.L.R.B. 451 (1961). The fact that employers have the option to recognize a mixed guard union voluntarily, however, does not require that the option be forever binding once accepted. Mixed guard unions are appropriate only so long as an employer consents to recognize them. *White Motor Corp.*, 404 F.2d at 1103. *Cf. Amoco Oil Co.*, 221 N.L.R.B. 1104 (1975) (noting that employer expressly consented to bargaining relationship).

Congress precluded certification of such unions because it realized that employers should not be forced to bargain with mixed guard unions. Employers may choose at the outset not to rely on the strictures that Congress enacted for their benefit, but the policy concerns inherent in the statute require that employers have the right to rely on it at some later point. Indeed, the record reflects that, regardless of Wells Fargo's present motivation for withdrawing recognition, the potential for divided loyalty is clearly present and likely heightened.

Local 807's argument that estoppel should apply to preclude Wells Fargo from withdrawing recognition is

inapposite. The policy considerations behind the statute override an estoppel theory, for to recognize an estoppel would result in a situation inconsistent with the purpose of the statute. *Cf. Teamsters Local 372 v. NLRB*, 735 F.2d 969, 971 (6th Cir. 1984). Reliance on such cases as *NLRB v. A. Lasaponara & Sons, Inc.*, 541 F.2d 992 (2d Cir. 1976), *cert. denied*, 430 U.S. 914 (1977), is misplaced. That case applies only to the situation in which a certifiable union is voluntarily recognized, rather than going to the expense of an election. We are dealing here with an uncertifiable union.

Finally, Local 807's claim that Section 9(b)(3) as interpreted violates its First Amendment right to freedom of association, as well as that of its member guards, is without merit. Balancing the public interest to be served, as found by Congress, against the minimal infringement, the provision is constitutional. *See Teamsters Local 344 v. NLRB*, 568 F.2d 12, 20 (7th Cir. 1977). Section 9(b)(3) does not abrogate rights—it simply makes them less attractive. Guards can join any union they wish. Any diminution of their rights is not imposed by the Board, but rather is freely self-imposed by guards when they select a mixed guard union as their representative.

Local 807 argues that even if the potential conflict of loyalty does exist, it could be eliminated by less drastic means, such as leaving the employer to negotiate for a broad no-strike clause. The Board, however, has refused to adopt this approach in a case of initial recognition, *Teamsters Local 639 (Dunbar Armored Express, Inc.)*, 211 N.L.R.B. 687, 689 (1974), and now refused to adopt it even where there has been prior bargaining. We decline to overturn its rulings.

The petition is dismissed.

MANSFIELD, *Circuit Judge* (Dissenting):

I respectfully dissent for the reason that in my view the Labor Management Relations Act (the "Act") does not authorize an employer unilaterally to withdraw recognition of a union with which the employer has had collective bargaining agreements for over 30 years merely because that labor organization is a "mixed-guard" union that could not in the first place have been certified as a representative of the employees.

This case of first impression is important since our decision can have a profound effect on the stability of collective bargaining relationships in businesses employing guards of many sorts throughout the nation (including plant guards, contract guards, armored car drivers and guards, couriers and deliverymen), who are represented by mixed-guard unions of their own choosing.[1] In my view the Board's action (with one member dissenting) in overruling the ALJ's recommended decision is unfortunate. Its effect is to upset well-established labor relationships by conferring upon employers of such personnel an unfair advantage going beyond the purpose and plain language of the Act.

Section 9(b)(3) of the Act was adopted by Congress in response to the reasoning of the Sixth Circuit in *NLRB v. Jones & Laughlin Steel Corporation*, 154 F.2d 932 (6th Cir. 1946). Though it was later reversed by the Supreme Court, 331 U.S. 416 (1974), the Court held that if demilitarized plant guards (who were also commissioned policemen) were represented by the same union as plant employees, they might find themselves in conflict with the latter when required as part of their duties to protect the employer's property and personnel. 154 F.2d at 934-35. The House proposed to resolve the conflict problem by excluding guards from the definition of "em-

[1] Local 807, a mixed guard union, alone represents both guard and non-guard employees of approximately 400 employers.

ployee" in § 2(3) of the Act. However, Congress chose not to go that far. Instead, it adopted § 9(b)(3) as a compromise between the House bill and a Senate version that extended the Act's coverage to guards. The Conference Committee's Report expressly stated that

> "[T]he Senate rejected a provision in the House bill which would have excluded plant guards as employees protected by the Act. . . . *Under the language of clause (3), guards still retain their rights as employees under the National Labor Relations Act*, but the Board is instructed not to place them in the same bargaining unit with other employees, or to certify as bargaining representatives for the guards a union which admits other employees to membership or is affiliated directly or indirectly with labor organizations admitting employees other than guards to membership." 93 Cong. Rec. 6444, reprinted in *II NLRB, Legislative History of the Labor Management Relations Act of 1947*, at 1541. (Emphasis supplied).

For present purposes the pertinent language of § 9(b)(3) is its provision that "*no labor organization shall be certified* as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards." (Emphasis supplied).

Nothing in the language of § 9(b)(3) prohibits the organization of a mixed-guard union or bars it from functioning as the representative of any group of employees. As the Supreme Court stated in *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 71-72 (1956):

> "Section 8(a)(5) declares it to be an unfair labor practice for an employer 'to refuse to bargain collectively with the representatives of his employees, *subject to the provisions of section 9(a).*' (Emphasis supplied.) Section 9(a), which deals expressly with

employee representation, says nothing as to how the employees' representative shall be chosen. See *Lebanon Steel Foundry v. Labor Board*, 76 U.S. App. D.C. 100, 103, 130 F.2d 404, 407. It does not make it a condition that the representative shall have complied with § 9(f), (g) or (h), *or shall be certified by the Board, or even be eligible for such certification.*[8]" (Emphasis supplied and footnotes omitted).

"[8] A Board election is not the only method by which an employer may satisfy itself as to the union's majority status." (Citations omitted).

In *NLRB v. White Superior Division, White Motor Corp.*, 404 F.2d 1100 (6th Cir. 1968), the court confronted the question of whether an employer violated § 8(a)(1) and (5) by discouraging membership of guard employees in a mixed-guard union. It concluded that, even though the NLRB could not certify the union in question (the IAM) because of its mixed-guard status, membership in such a union was not unlawful and the employees could rightfully choose it to represent them:

> "It is true that the I.A.M. [the mixed-guard union] could never be certified as bargaining agent for the guards but this does not change the fact that the guards have a right under § 7 of the Act to be members of the I.A.M. To hold otherwise would attribute too much to certification. It would, in effect, be saying that no labor organization has rights under the Act save a certified one. Certification gives an organization which achieves it additional rights not all its rights." 404 F.2d at 1103 n.5.

Indeed, the Board has for many years recognized that the prohibition against certification does not constitute a bar to recognition. *See, e.g., Wm. J. Burns Int'l Detective Agency, Inc.*, 134 N.L.R.B. 451, 463 (1961):

> "Congress could readily have declared a guard unit inappropriate if the representative of that unit ad-

> mitted non-guards to membership or was a direct or indirect affiliate of a labor organization which did so. Congress did not so declare, and the preceding statutory language covering the 'mixed guard unit' compels the conclusion that this omission in the latter situation was deliberate."

Although a union gains some advantages from certification (e.g., protection from raiding unions, § 8(b)(4)(C), right to engage in concerted action in support of a jurisdictional dispute, § 8(b)(4)(D)), a non-certified union representing a majority of the employees in a unit is entitled to the protections of the Act. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 598-99 (1969); *Rock-Hill-Uris, Inc. v. McLeod*, 236 F. Supp. 395 (S.D.N.Y. 1964), *aff'd per curiam*, 344 F.2d 697 (2d Cir. 1965) (placement of non-certified union's name on ballot); *NLRB v. White Superior Division, White Motor Corp.*, *supra* (protection against employer's discouraging employees from choosing a mixed-guard union); *Bally's Park Place*, 257 N.L.R.B. 777 (1981) (mixed guard union's name may appear on ballot as intervenor in representation election); *Amoco Oil Co.*, 221 N.L.R.B. 1104 (1975) (employer required to recognize plant guard representative from uncertifiable union elected by production and maintenance unit); *Wm. J. Burns Int'l Detective Agency, Inc.*, 134 N.L.R.B. 451 (1961) (normal contract-bar rules apply to a collective-bargaining agreement between an employer and mixed-guard union). As the Sixth Circuit pointed out in *NLRB v. White Superior Division, White Motor Corp., supra*:

> "Since membership by guard employees in a union which also represents non-guards is not unlawful, it would be an unfair labor practice for an employer to take discriminatory action against guard employees on account of such membership." 404 F.2d at 1103.

One of the normal requirements of the Act is that once a valid bargaining relationship has been established the employer may not, if the union continues to represent a majority, repudiate it at the end of a contract since the effect would be to destroy the stability of relationships which the Act is designed to promote. *NLRB v. A. Lasaponara & Sons, Inc.*, 541 F.2d 992, 995 (2d Cir. 1966); *Int'l Telephone & Telegraph Corp.*, 159 N.L.R.B. 1757 (1966), *enforced in rel. pt.*, 382 F.2d 366 (3d Cir. 1967), *cert. denied*, 389 U.S. 1039 (1968); *Retail Clerks Local 324 (Vincent Drugs)*, 144 N.L.R.B. 1247 (1963).

> "On the basis of the foregoing findings the Board held that the Company violated Sections 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5), (1), by withdrawing recognition from the Union and refusing to bargain collectively and by unilaterally changing the terms and conditions of employment of its employees. We agree. Once a collective bargaining agent is voluntarily recognized by an employer as the representative of its employees the bargaining relationship must be permitted to continue and recognition may not be withdrawn at will." 541 F.2d at 995.

To hold otherwise would be to put the employees at an unfair advantage, particularly during the period of an economic strike after the current contract has terminated, which is the situation in the present case. The threat of instant withdrawal of recognition thereafter, like a Sword of Damocles, would pose such a severe penalty that the employees would, despite having established a valid, healthy and long-continued bargaining relationship, be unable to continue it on a fair basis by invoking the protections of the Act to which they are entitled.

Thus a distinction must be drawn between creating, establishing, or certifying a union as the agent for establishing a collective bargaining relationship, on the one hand, and maintaining such a relationship after it

has been created by the parties, on the other. Once an employer recognizes a non-certified union, that union is entitled to seek and obtain from the Board the same remedies as those available to a certified union. As the Board stated in *Int'l Telephone & Telegraph, supra*, 159 N.L.R.B. at 1764:

> "On the contrary, we find that the unit which both parties recognized as appropriate when they entered into their 1964 negotiations was a product of the agreement of the parties. Bearing in mind that such a unit is not inherently inappropriate, and considering particularly the long bargaining history in that unit, as well as the timing and context of the Respondent's withdrawal, we hold that the Respondent is estopped at this time from disputing the appropriateness of the unit which it itself had accepted as a proper basis for bargaining during the very negotiations which it later disrupted by its withdrawal of recognition. Accordingly, we find that the Respondent, by withdrawing recognition from and refusing to bargain with the Union as bargaining representative of the professional employees in the engineer-technician unit has violated Section 8(a)(5) and (1) of the Act since October 8, 1964."

In enacting § 9(b)(3) as a compromise Congress was well aware of these distinctions. It recognized that it could have declared a mixed-guard union or affiliation to be inherently inappropriate. Instead, it chose to discourage such organizations only to the extent of denying them certification. It refused to make certification a condition precedent to representation by a mixed-guard union or recognition of such a union by an employer. If, as here, an employer chose to enter into a collective bargaining relationship with such a union, "[u]nder the language of clause (3), guards still retain their rights as employees under the National Labor Relations Act," *II NLRB, Legislative History of the Labor Management*

Relations Act of 1947, at 1541.[2] In view of the scalpel-like precision with which Congress, after much debate, chose its compromising language, we should adhere to its plain unambiguous terms. *See, e.g., Garcia v. United States*, 105 S. Ct. 479 (1984) (when court finds the terms of a statute unambiguous, its inquiry is complete, except in "rare and exceptional circumstances") (quoting *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930)).

Despite the plain language of § 9(b)(3) and the foregoing legislative history, the majority seeks to rewrite the Act on the basis of what it conceives to be "policy concerns inherent in the statute" and "policy considerations behind the statute" (Maj. Op. 14), relying on its own *ipse dixit* that "it is reasonable to infer from the statutory language and the decisions under it that the

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[2] The majority relies on the statement of Senator Taft that "plant guards . . . could have the protection of the Wagner Act only if they had a union separate and apart from the union of the general employees," as indicating that such a union could not invoke the processes of the Act. However, it is clear that Senator Taft was referring to a union's right to obtain *certification* as a collective bargaining representative, not to its other rights under the Act, which were clearly recognized in the quoted text of the Conference Committee's Report and in the numerous decisions so interpreting § 9(b)(3).

The majority also refers (Maj. Op. 10) to a statement by Sen. Murray as indicating an intent to change existing bargaining patterns. The context makes clear, however, that Sen. Murray was not asserting that, except for certification, the changes wrought by 9(b)(3) deprived guards of other rights under the Act. Moreover, the Conference Committee's report, which flatly states that guards retain their rights as employees under the National Labor Relations Act, prevails over the passing statement of one legislator. *See, e.g., United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 600 (1982) ("Passing references and isolated phrases are not controlling when analyzing a legislative history."); *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979) (in analyzing legislative history, remarks of single legislator (even sponsor) are not controlling, and must be considered along with reports of both Houses and statements of other Congressmen).

preclusion of certification portends more than merely a simple check on the Board's power to certify the results of an election." (Maj. Op. 12). Nothing in the statutory language or decisions under the statute supports that broad statement.[3] Moreover, the statement is directly contrary to the Act's strong policy in favor of maintaining ongoing relationships between an employer and a union representing a majority of its employees.

In the present case there is no question about the appropriateness of the bargaining unit involved or about Local 807's representation of a majority of the employees in that unit. Over the last 30 years of representation by a mixed-guard union recognized by Wells-Fargo (first, Local 820, a guard unit affiliated with the Teamsters, a non-guard organization, and, later, Local 807, into which Local 820 merged) the employees have not experienced any actual or potential conflict of loyalties.[4] There was no question raised by Wells-Fargo or anyone else about Local 807's right or authority to represent the Wells-Fargo guards when Local 820 merged into Local 807 on June 18, 1979, or when the existing contract was terminated on March 16, 1980. Indeed that contract provided

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[3] The majority reliance on *Teamster's Local 71 v. NLRB*, 553 F.2d 1368 (D.C. Cir. 1977), is misplaced. It understandably held that a mixed-guard union could not picket for the purpose of obtaining certification barred to it by § 9(b)(3). The court carefully noted, "However, it is not inconsistent for the Board to allow an *incumbent* non-qualifying union to appear on the ballot where a qualifying union has petitioned for an election." *Id.*, 553 F.2d at 1376 n.29. (Emphasis in original). In the present case we are dealing with an incumbent mixed-guard union that has been recognized in the past by Wells-Fargo as the authorized bargaining representative of its guard employees.

[4] ALJ Itkin observed:

> "I note that, although Local 820 only represented 'guard employees', there is no real dispute here that, because of its affiliation with the Teamsters International, it would at all times pertinent to this sequence be treated under Section 9(b)(3) as a so-called mixed guard Union."

that it was "entered into by the Union and the Employer on behalf of themselves, their successors and assigns." It was not until June 2, 1980, that Wells-Fargo withdrew recognition. In the intervening months 14 bargaining sessions were held in an effort to reach a continuing labor agreement, with Wells-Fargo and Local 807 stipulating that all terms and conditions would be retroactive to March 17, 1980, the day after the termination date of the previous agreement. Wells-Fargo withdrew recognition not because of any conflict or potential conflict on the part of its guard employees by reason of their representation by Local 807 but solely for economic reasons.

Thus there is no support in the record for the majority's statement that in the present case "the record reflects that, regardless of Wells Fargo's present motivation for withdrawing recognition, the potential for divided loyalty is clearly present and likely heightened." (Maj. Op. 14). The testimony of Timothy Hughes, Wells Fargo's Vice President in charge of labor relations, that the company withdrew recognition for various "security" reasons was rejected by ALJ Itkin, who found it incredible, stating:

> "In particular, as discussed further below, I do not credit Hughes' assertions pertaining to the Employer's 'reasons' for withdrawing recognition from Local 807. I find here that these belated, eschewed, shifting and contradicted 'reasons' for the Employer's summary withdrawal of recognition on June 2, 1980, are afterthoughts now offered in an attempt to justify the Employer's action. I find that the Employer's June 2 decision was, in fact, predicated solely upon economic considerations, namely, Local 807's refusal to accept the Employer's 'final order.' See G.C. Exh. 14, quoted *supra*. In short, the Employer's belatedly claimed 'security' and 'conflict' related 'reasons' for refusing, after about one year, to bargain or deal any further with Local 807 are,

> on this record, plainly pretextual, and are not the real or true reasons for the action taken."

These findings were accepted by the Board, which stated "We have carefully examined the record and find no basis for reversing the findings." [5]

In short, the majority holds that an employer may recognize and contract with a non-certified union representing a majority of its employees as long as it conceives the arrangement to be to its advantage, but then unilaterally sever the relationship at will whenever it sees no advantage to it in a continuation, leaving the employees suddenly without a representative after many years of representation by the union. This decision is not only fundamentally unfair to the employees but contrary to the Act's basic policy of encouraging stability in labor relations. It is particularly unfortunate when one considers the hesitancy with which the term "guards" (originally referred to as "plant" guards because of the potential conflict faced by them in enforcing their employer's rules against co-employees who are members of the same union) was extended to "armored car employees" who are not employed to protect the *employer*'s property under such circumstances but to protect the property of customers. *Armored Motor Service Co.*, 106 N.L.R.B. 1139 (1953) (NLRB held, after much shifting of position, that armored car guards, who primarily protect property of the customers, are "guards" within the meaning of § 9(b)3); *see also Local 851 v. NLRB*, 732

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[5] The testimony of Hughes that Local 807 was picketing one of Wells-Fargo's customers, Payomatic, proved to be totally incorrect. It was controverted by the testimony of another Wells-Fargo employee, John Isaacs, and union officials—whose testimony ALJ Itkin credited—that the picketing was not of Payomatic but of Rapid Armored, which was *not* a customer of Wells-Fargo but happened to be located close to the same site as Payomatic. It is not disputed that Local 807, under its contract with Wells-Fargo, had the right to picket Rapid Armored.

F.2d 43 (2d Cir. 1984) (per curiam) (armored car guards are "guards" for § 9(b)3 purposes).

For these reasons I would be guided by the Court's statement in *NLRB v. Yeshiva University*, 444 U.S. 672, 691 (1980), that although "we accord great respect to the expertise of the Board when its conclusions are rationally based on articulated facts and consistent with the Act . . . [i]n this case . . . the Board's decision satisfied neither criterion." As in *American Shipbuilding Co. v. NLRB*, 380 U.S. 300, 318 (1965), "the role [here] assumed by the Board . . . is fundamentally inconsistent with the structure of the Act and the function of the sections relied upon."

I would reverse the Board's order for the reason that Wells Fargo's withdrawal of recognition of Local 807 violated § 8(a)(1) and (5) of the Act and remand the case to the Board for adoption of the ALJ's recommended order.

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 26th day of March one thousand nine hundred and eigthy-five.

Docket No. 84-4083

TRUCK DRIVERS LOCAL UNION NO. 807, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and FRED M. CAPUTO, an Individual,

Petitioners,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

WELLS FARGO ARMORED SERVICE CORPORATION,

Intervenor.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Petitioners, Local 807.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

APPENDIX C

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270 NLRB No. 106

D—1769
New York, NY

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 2—CA—17305

Case 2—CA—17394

WELLS FARGO ARMORED SERVICE CORPORATION

and

TRUCK DRIVERS LOCAL UNION NO. 807, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

and

FRED M. CAPUTO, An Individual

DECISION AND ORDER

On 3 March 1982 Administrative Law Judge Frank H. Itkin issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to

affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

Contrary to the judge, we find that the Respondent was privileged to withdraw recognition from the Union at the time that it did, and, accordingly, we find that the Respondent did not violate the Act as alleged.

The Union, a so-called mixed guard union,[2] had represented a unit of the Respondent's guard employees since June 1979 pursuant to the Respondent's voluntary recognition of the Union as collective-bargaining representative in that unit. On 28 February 1980 [3] the Respondent and the Union began negotiations for a new contract to replace the one due to expire 16 March. Negotiations continued through the contract's 16 March expiration date, but the parties were unable to resolve substantial issues. Then on 14 April the Respondent's guards picketed the Respondent's terminals and commenced an economic strike against the Respondent. The parties had sporadic discussions during the strike but were unable to reach an agreement. On 2 June, while the strike was still in progress, the Respondent withdrew recognition from the Union. The guards thereafter continued to strike. The judge found that the Respondent's withdrawal of recognition was violative of Section 8(a)(5) and (1) of the Act and that the economic strike was converted to an unfair

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] A mixed guard union is one which represents guards but which also admits nonguards to membership or is affiliated directly or indirectly with an organization which admits nonguards to membership.

[3] All dates refer to 1980.

labor practice strike 2 June when the Respondent withdrew recognition.

In finding the violation, the judge concluded that the Respondent withdrew recognition based solely on an economic consideration, i.e., the Union's refusal to accept its final contract offer. In light of its earlier recognition of the Union, the judge then concluded that the Respondent was "estopped" from withdrawing recognition for this reason. The judge found nothing in Section 9(b)(3) of the Act inconsistent with such a finding. We disagree.[4]

Section 9(b)(3) of the Act indicates that the Board shall not:

> . . . decide that any unit is appropriate for [collective-bargaining] purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but *no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.* [Emphasis added.]

It is the prohibition against certification contained in Section 9(b)(3) that is at issue here.

At the outset, there are several undisputed points about this section which are worth noting. It is clear that the Board is statutorily prohibited from certifying the Union in the unit of guards at issue here. This notwithstanding, it has been previously held that an employer may, if *it* chooses, recognize a mixed guard union for purposes

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[4] In reversing the judge, we find it unnecessary to pass on whether the Respondent would have been privileged to withdraw recognition within the contract term.

of collective-bargaining.[5] Thus, the Respondent's initial voluntary recognition of the Union was lawful even though the Board could not certify it as the bargaining representative of the guards. But now the Respondent desires to end that voluntary relationship. We conclude that the judge's decision that the Respondent cannot do so gives the Union indirectly—by a bargaining order—what it could not obtain directly—by certification—i.e., it compels the Respondent to bargain with the Union.[6]

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[5] *NLRB v. White Superior Division*, 404 F.2d 1100 (6th Cir. 1968). But the choice is the employer's. The court in *White Superior Division* made it clear that, if the employer refuses any request to bargain from a mixed guard union, the employer commits no unfair labor practice. 404 F.2d at 1103-1104.

[6] Our dissenting colleague asserts our use of the term "bargaining order" is "specious" because it purportedly connotes we would be *establishing* a bargaining relationship rather than simply *maintaining* the relationship the Respondent itself created. We choose the term "bargaining order" simply because to find a violation here would then necessitate our issuing an "order to bargain" —as our colleague himself admits. And we are unable to do so here. Cf. *NLRB v. White Superior Division*, 404 F.2d at 1103; *Harrah's Marina Hotel*, 267 NLRB No. 163 (Aug. 26, 1983); *Supreme Sugar Co.*, 258 NLRB 243 (1981); *Bambury Fashions*, 179 NLRB 447, 451 (1969); *Bausch & Lomb Optical Co.*, 108 NLRB 1555 (1954).

Our colleague claims that, while in certain circumstances the Board may not certify a union in a particular unit, it may nonetheless uphold a bargaining relationship earlier established by the parties in that unit. He cites three cases which all purportedly deal with the 9(b)(1) limitation that the Board may not find mixed units of professionals and nonprofessionals appropriate unless the professionals have had an opportunity to vote on their inclusion. However, Sec. 9(b)(1) is not applicable here. Further, contrary to our colleague's indication, the first case he cites, *Westinghouse Electric Corp. v. NLRB*, 236 F.2d 939 (3d Cir. 1956), did not involve an analysis of the 9(b)(1) limitation or of the Board's ability to allow parties to maintain a unit that the Board could not create. Rather, the court there dealt with a claim that a unit had to include all professionals and, because it did not, that it was inappropriate. The court rejected that claim but also stated, as

We see no basis for such a result and, indeed, we believe it is inconsistent with congressional intent as manifested by Section 9(b)(3) of the statute. The judge indicated that the language of Section 9(b)(3) prohibited *only* the certification of a mixed guard union but not the forced continuation of a bargaining relationship already established. However, the judge's distinction between establishing a bargaining relationship by certification and

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pertinent, "[t]he proviso of Section 9(b)(1) refers to a mixed unit and is not applicable here for the unit we are considering is composed of all professional employees." 236 F.2d at 943.

In the second case our colleague cites, *Retail Clerks Local 324 (Vincent Drugs)*, 144 NLRB 1247 (1963), the Board *was* confronted with the issue of the parties' maintenance of a mixed unit that did not meet the 9(b)(1) standards. The union there attempted to have a professional employee who had never joined the union fired through the use of a union-security clause. The General Counsel alleged a violation against the union claiming the unit was inappropriate because the professionals had not been given their 9(b)(1) rights, and thus the union-security clause was unenforceable. The Board rejected the claim and drew a distinction between the Board's establishing such a unit and the parties' doing so. However, in making that distinction it relied heavily on the court's opinion in *Westinghouse*. This was an error because, as noted, *Westinghouse* did not deal with a mixed unit situation. Moreover, in *Vincent Drugs* the Board relied heavily on the legislative history of Sec. 9(b)(1) in reaching its decision. Here, we deal with another section, Sec. 9(b)(3), with a much less detailed legislative history. We will not here read into Sec. 9(b)(3) various legislative comments directed toward Sec. 9(b)(1) of the Act. Further, the issue in *Vincent Drugs*, dealing with an individual professional employee's relationship with the union, would now have to be analyzed in light of *Utah Power Co.*, 258 NLRB 1059 (1981) discussed infra. The last case cited by our colleague, *International Telephone & Telegraph Corporation*, 159 NLRB 1757 (1966), is discussed later in our decision.

We also note that our colleague's references to former Subsecs. 9(f), (g), and (h) of the Act do not dissuade us from the conclusion that the legislative history we describe infra regarding Sec. 9(b)(3) and the manner in which that section has been interpreted support the decision we reach here.

compelling continuation of an earlier voluntary relationship through a bargaining order completely overlooks the purpose for which Section 9(b)(3) was enacted.

Thus, Section 9(b)(3) was enacted by Congress in 1947 largely in response to the Supreme Court's decision in *NLRB v. Jones & Laughlin Steel Corp.*[7] in *Jones & Laughlin*, the Board had ordered the company to bargain with a union which it had certified in a guard unit even though the union also represented other company employees in a production unit. The Court of Appeals for the Sixth Circuit denied enforcement of the Board's Order in two decisions. In the key decision here, the second one, the court noted that at that time the guards were also police officers under the statutes of the State of Ohio. The court stated:[8]

> Their functions and obligations therefore are of a dual character. They have a private obligation to their employer and an obligation to the community as sworn, bonded and commissioned police officers. In case of industrial unrest and strikes on the part of the production employees, the obligations of the plant guards to the municipality and state would be incompatible with their obligations to the Union which, since it represents production employees, authorizes and directs the strike.

The Supreme Court in *Jones & Laughlin* reversed the Sixth Circuit and enforced the Board's Order. However, Congress was then undertaking an investigation of the employment status of guards and, ultimately, the House-Senate Conference Committee adopted the provision that is now Section 9(b)(3) of the National Labor Relations Act. It was decided that guards would retain their rights

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[7] 331 U.S. 416 (1947).

[8] 154 F.2d 932, 935 (6th Cir. 1946).

as statutory employees but, according to Senator Taft, the Committee was also "impressed" with the reasoning of the Sixth Circuit in *Jones & Laughlin*.[9] As a result, the

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[9] While it is arguable that the Sixth Circuit and Supreme Court decisions in *Jones & Laughlin* focused on the narrower issue of the effect the guards' being deputized had on the question of whether the union could be certified by the Board, it is clear that Congress' focus on the status of guards was not nearly that narrow, and that the favorable reference to the Sixth Circuit decision in the legislative history was not premised on the basis that the plant guards at issue were also police officers. Rather, Congress decided that because of the special status of guards generally certain broad restrictions on their representation were necessary. Reference to the full text of Senator Taft's remarks bears this out. He stated:

> Section 9(b) is also the same as section 9(b) of the Senate amendment with the exception of an addition of a third clause relating to plant guards. As has been previously stated, the Senate rejected a provision in the House bill which would have excluded plant guards as employees protected by the act. The conferees on both sides, however, have been impressed with the reasoning of the Circuit Court of Appeals for the sixth circuit in the Jones and Laughlin case in which an order of the Board certifying as a bargaining representative of guards, the same union representing the production employees was set aside. Although this case was recently reversed by the Supreme Court on the ground that the Board had it within its power to make such a holding, four of the Justices agreed with the Circuit Court of Appeals holding that this was an abuse of the discretion permitted to the Board under the act. One of the members of the Board has also expressed this view in a number of dissenting opinions. Under the language of clause (3), guards still retain their rights as employees under the National Labor Relations Act, but the Board is instructed not to place them in the same bargaining unit with other employees, or to certify as bargaining representatives for the guards a union which admits other employees to membership or is affiliated directly or indirectly with labor organizations admitting employees other than guards to membership.

93 Cong. Rec. S6444 (1947) (remarks of Sen. Taft). Indeed, the Board has so construed the legislative history since 1948. See

two limitations of Section 9(b)(3) were set out—the first prohibiting the Board from treating a mixed unit of guards and nonguards as appropriate and the second prohibiting the certification of a mixed guard union in a guard unit.

It is clear that the remarks of Senator Taft show that Congress' purpose in enacting Section 9(b)(3) was to shield employers of guards from the potential conflict of loyalties arising from the guard union's representation of nonguard employees or its affiliation with other unions who represent nonguard employees. However, this potential conflict of loyalties exists whether a mixed guard union is certified or not. Viewed in this light, there is no basis for the Board's drawing a distinction between initial certification and, as here, the compulsory maintenance of a bargaining relationship through the use of a bargaining order. In either case, saddling the employer with an obligation to bargain presents it with the same set of difficulties and the same potential conflict of loyalties that Section 9(b)(3) was designed to avoid.[10]

Schenley Distilleries, 77 NLRB 468 (1948), and *International Harvester*, 145 NLRB 1747, 1750 fn. 8 (1964).

Thus, our colleague's proposal that one reading of the legislative history is that Sec. 9(b)(3) is only applicable where the guards involved have a connection with "public or governmental" entities is clearly in error.

[10] The judge rejected the Respondent's assertion that its withdrawal of recognition was based on its concern over "security" and "conflict of loyalties" and instead found that the Respondent withdrew recognition for economically motivated reasons. We accept this conclusion for purposes of this case. However, that does not alter our decision here because it is undisputed that the Respondent's employees are statutory guards and that the Union also represents nonguards. Thus, the *potential*, for a conflict of loyalties always exists. In fact, in April 1980 while the parties were still negotiating such an occasion for a demonstrated conflict of loyalties arose. At another location the Union established a picket line which the Respondent's guards, represented by the Union, refused

The General Counsel argues, however, that the language of Section 9(b)(3) at issue here only prohibits the Board's certifying the Union. But it is axiomatic that the legislative history of a provision must be analyzed and considered in applying the statute because the "circumstances of the enactment . . . may persuade a court that Congress did not intend words of common meaning to have their literal effect." [11] In interpreting Section 9(b)(3), the Board itself has not confined its analysis to the literal wording of Section 9(b)(3). Thus, more than 30 years ago, in *Armored Motor Service*,[12] the Board held for the first time that armored car guards were "guards" within the meaning of Section 9(b)(3). The Board found that this conclusion, while not required by the plain language of Section 9(b)(3),[13] was compelled by the policy underling the section. In *Armored Motor Service*, the Board stated: [14]

> The danger of divided loyalty which Congress sought to eliminate may not be quite so far-reaching in the case of armored-car guards [as opposed to plant guards], but it is, nevertheless, present. A conflict of loyalty could arise, for example, if the guards should be called upon to deliver money or valuables to one of their customers whose employees were

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to cross. As a result, the guards' armored vehicle, with its cargo, was left stranded on the street. Hence, on at least one occasion the potential for a conflict of loyalties which concerned the Congress turned into a reality.

[11] *Watt v. Alaska*, 451 U.S. 259, 266 (1981).

[12] 106 NLRB 1139 (1953).

[13] As noted, Sec. 9(b)(3) defines a "guard" as "any individual employed . . . to enforce against employees and other persons rules to protect property *of the employer* or to protect the safety of persons on the employer's premises [emphasis added]." Armored car guards primarily protect property belonging not to their employer, but to customers of their employer.

[14] 106 NLRB at 1140.

> represented by the same union as represented the armored-car guards and the employees of the customer were on strike and picketing the premises of the customer.
>
> Accordingly, we overrule the decision in the *Brink's* case, *supra*, and hold that armored-car guards are guards within the meaning of Section 9(b)(3). These guards are obviously employed to protect property within the meaning of the statute, and, in view of the statutory language, we do not consider it controlling that the money and valuables which they protect belong not to their own employer but to a customer of their employer.

The Board in *Armored Motor Service* thus went beyond the language of the statute to give effect to the purpose of Congress in finding armored car guards to be statutory guards. In the instant case, a too literal reading of the statute effectively would thwart that congressional purpose.

Finally, we turn to the judge's conclusion that the Respondent should be "estopped" from withdrawing recognition because it had previously extended recognition to the Union.[15] In so concluding, the judge relied on *International Telephone & Telegraph Corp.*[16] In *ITT*, a Board majority held that an employer was "estopped" from withdrawing recognition from a union which it had voluntarily recognized for 13 years in a mixed unit of professional and nonprofessional employees nothwithstanding the fact that the professional employees had never voted in a self-determination election as required by Section

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[15] We note in passing that this recognition was for less than 1 year and that most of that time was governed by the Union's predecessor's bargaining agreement. We find the Respondent's longstanding recognition of the Union's predecessor to be irrelevant.

[16] 159 NLRB 1757 (1966), enfd. as modified 382 F.2d 366 (3d Cir. 1967).

9(b)(1) of the Act. In finding a violation in the employer's withdrawal of recognition, the Board noted the consensual nature of the parties' relationship but also noted their long bargaining history and the fact that the withdrawal occurred in a context of other unremedied unfair labor practices. Here, by contrast, the parties' relationship was less than 1 year old when recognition was withdrawn, and recognition was withdrawn in a context free of other unfair labor practices.

In reaching its conclusion, the Board in *ITT* further noted that its holding was "not to be construed as foreclosing the professionals in the unit from seeking [a] self-determination [election] at an appropriate time and in the appropriate proceeding." [17] This comment has great significance here in light of another Board decision which was not discussed by the judge. In *Utah Power Co.*,[18] the Board referred to the "estoppel" theory relied on in *ITT*. In *Utah Power*, as in *ITT*, professional employees had been included in a unit with nonprofessional employees without being afforded an opportunity to vote in a self-determination election as required by Section 9(b)(1). In *Utah Power*, however, the Board determined that the professional employees were not precluded from asserting their statutory rights to a self-determination election although they had accepted their situation for *43 years*. In so finding, the Board *distinguished ITT* and noted that the proceeding in *Utah Power* "was initiated at an appropriate time by professional employees under a provision intended for their protection." [19] Contrary to the judge, we conclude that here the Respondent was not estopped from withdrawing recognition from the Union because the estoppel theory, as shown in *Utah Power*, does not operate to preclude the *intended beneficiary* of

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[17] Id. at 1764 fn. 15.

[18] 258 NLRB 1059.

[19] Id. at 1061 fn. 14.

the statute from asserting rights thereunder. Inasmuch as Respondent obviously belongs to the class which is the intended beneficiary of Section 9(b)(3), it was not estopped from asserting its rights under that section by refusing to bargain with the Union when it did.[20]

In sum, while we agree that the Respondent and the Union could enter into a valid voluntary collective-bargaining relationship, we find that the Respondent was privileged to withdraw from the relationship at the time that it chose to do so.[21] Accordingly, we conclude that the Respondent did not violate Section 8(a)(5) and (1) by withdrawing recognition from the Union on 2 June, and we also conclude that the economic strike was not converted to an unfair labor practice strike upon the Respondent's withdrawal of recognition.

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[20] Member Dennis finds *ITT* distinguishable on the basis stated in this paragraph. She does not find the length of the bargaining relationship or the absence of other unfair labor practices to be relevant distinguishing factors.

[21] We find cases such as *Amoco Oil Co.*, 221 NLRB 1104 (1975), distinguishable from the instant case. In finding a violation in *Amoco*, the Board expressly noted that the employer there *admitted* the mixed guard union's status as collective-bargaining representative and did not attack the bargaining relationship. This is precisely the opposite of what the Respondent is contending here; hence, *Amoco* has little relevance. Likewise, the issues presented in *Bally's Park Place*, 257 NLRB 777 (1981) (mixed guard union's name may appear on a ballot as an intervenor in a representation election), and *Burns Detective Agency*, 134 NLRB 451 (1961) (normal contract-bar rules apply to a collective-bargaining agreement between an employer and a mixed guard union), are irrelevant to the issues in this proceeding.

We thus, find it unnecessary to decide whether *Amoco*, *Bally's*, and *Burns* were correctly decided, as we agree they are inapposite.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. May 18, 1984

DONALD L. DOTSON, Chairman

ROBERT P. HUNTER Member

PATRICIA DIAZ DENNIS Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

MEMBER ZIMMERMAN, dissenting.

Section 9(b)(3) states that, with respect to guards, the Board shall not do two things. One, it shall not "decide that any unit is appropriate" when it includes both guards and nonguards. The unit involved here does not. Consisting as it does of all nonsupervisory guards employed by the Respondent, it obviously is an appropriate unit and I do not read the majority's opinion as suggesting otherwise. Two, Section 9(b)(3) states the Board shall not "certif[y] as the representative" of an all-guards unit any union which further admits nonguards to membership or is affiliated with another union which does.

Today, in a novel but untenably expansive construction of Section 9(b)(3), the Board holds that this latter proscription privileges the Respondent to withdraw from its voluntarily entered into bargaining relationship "when it did," "at the time that it chose to do so," and "on 2 June."[1] This view of Section 9(b)(3) is required, the

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[1] My colleagues employ such terminology because, in their words, they "find it unnecessary to pass on whether the Respondent would have been privileged to withdraw recognition within the contract term" too. Similarly, they find the Board's decision in *Burns Detective Agency*, 134 NLRB 451 (1961), both "irrelevant" and "inapposite" to the issue posed here. See also *Wallace-Murray Corp.*, 192 NLRB 1090 (1971), to which the majority does not allude but in which the Board did not permit an employer to amend, much less walk away from, an extant contract which covered a mixed unit of guards and nonguards, that is, a unit which the Board could *not* decide was appropriate under Sec. 9(b)(3). I agree that the principles reflected in *Burns* and *Wallace-Murray*, in a technical sense, do not control here. But those cases are nonetheless quite relevant. For, if a respondent *could* withdraw recognition during a contract term from a voluntarily recognized mixed union, the net result, in light of today's decision, would be that the 9(b)(3) bar against "certifying" a mixed union as the representative of an all-guards unit becomes no less than the statutory equivalent of Sec. 8(f) and/or Sec. 14(a). If that is the construc-

majority asserts, because a literal adherence to the 9(b)(3) certification bar would give the "Charging Party indirectly—by a bargaining order—what it could not obtain directly—by certification" and that would be "inconsistent with congressional intent" behind Section 9(b)(3). The majority, in my judgment, has both mischaracterized the question and misread the legislative history.

Usage of the term "bargaining order" strikes me as particularly specious in a case of this character. True, if the Charging Party were to prevail, the Board would issue an Order which would have the effect of requiring the Respondent to bargain. But we would not thereby be *establishing* the bargaining obligation. The Respondent itself did that. Our Order more fairly would be characterized as one compelling Respondent to *maintain* the relationship it, not we, created.

The distinction between the Board's creation and maintenance of a unit has long been recognized. In *Westinghouse Electric Corp. v. NLRB*, 236 F.2d 939 (3d Cir. 1956), which involved the 9(b)(1) limitation with respect to mixed professional and nonprofessional employee bargaining units, the court characterized that limitation as having the "obvious effect" of being "merely a limitation on the Board's power to *create*" such units.[2] In part relying on *Westinghouse*, the Board made the same distinction between its establishment of a unit and its upholding of the validity of such a unit in *Retail Clerks Local 324 (Vincent Drugs)*, 144 NLRB 1247 (1963)—today found to be "error" by my colleagues. And it was on the basis of *Westinghouse* and *Vincent Drugs* that the Board, in *International Telephone & Telegraph Corp.*, 159

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tion this majority gives to Sec. 9(b)(3), it should tell us so. If it has yet not made up its mind, I believe it should await that moment before deciding this case.

[2] 236 F.2d at 943, emphasis added.

NLRB 1757 (1966), issued the very bargaining order the majority now says it is not empowered to issue.

Moreover, the distinction finds support in the enactment, contemporaneous with the enactment of Section 9(b)(3), of former Subsections 9(f), (g), and (h). For those sections demonstrate that, when Congress wished to disqualify a union not only from certification but, more broadly, from resort to the Board for the protection of existing bargaining relationships, Congress well knew how to achieve that end. All three subsections not only disqualified noncomplying unions from having their petitions processed, they further, and specifically, provided that their charges could not result in complaints. Indeed, in *NLRB v. Mine Workers District 50*, 355 U.S. 453 (1958), the Supreme Court held that a Board Order requiring an employer to withdraw recognition from the Mine Workers unless and until it was certified by the Board was an abuse of Board discretion *precisely because* the Mine Workers Union was noncomplying and therefore could not be certified. The Court reasoned that, in the context of an unfair labor practice proceeding,[3] the Mine Workers noncompliance with Section 9(f), (g), and (h) need not, and should not, have operated to frustrate the right of the employees involved to select the Mine Workers as their representative.

And the distinction finds support in the language of Section 9(b)(3) itself. Plainly, Congress could have written that mixed unions could not represent all-guards units. It did not. Given the shape Section 9(b)(3) ultimately took, Congress plainly could have written that the Board should not decide to be appropriate either a mixed unit or a unit which, though not mixed, was represented or sought to be represented by a mixed union.

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[3] The Mine Workers had been found to have been an unlawfully assisted union within the proscription of Sec. 8(a)(2) upon charges filed by a Teamsters local in compliance with the provisions of Sec. 9(f), (g), and (h).

It did not. Instead, as the structure of Section 9(b)(3) makes evident, it permitted a unit composed exclusively of guards to be found by the Board to be appropriate whether or not it was represented or sought to be represented by a mixed union. The net effect is that cases involving voluntary recognition represent the precise circumstance which gives meaning to Congress' determination that the Board, though not able to certify a mixed union, could decide that the unit such a union represents is appropriate.

The legislative history of the section is consonant with such a construction. Certainly, and more importantly, nothing in it supports the view that when Congress wrote the Board should not certify mixed unions it meant to deprive them of not only certification, but also long-established rights flowing from the voluntary recognition. Indeed, to the extent it can be read as overcoming the language of Sections 9(b)(3), the legislative history more narrowly suggests that Congress only intended to prohibit the Board from *certifying some* mixed unions, namely, those which directly or indirectly admitted *co-workers* of the guards to membership. Previous Boards have recognized as much, but have construed the words of Section 9(b)(3) to mean precisely what they say.[4] Here, the Board refuses to do either, and so the legislative history commands renewed attention.

Prior to Taft-Hartley, three recurring issues were posed by the representation of guards, all three of which were present, at one stage or another, in *Jones & Laugh-*

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[4] See, e.g., *International Harvester*, 145 NLRB 1747 (1964). Like the Board there, I view Sec. 9(b)(3) as not restricted to situations in which the mixed union represents or seeks to represent coworkers of the guards. Like the Board there, I do so on the basis of the words of Sec. 9(b)(3) which define what has come to be called a mixed union. See my concurring position in *Bally's Park Place*, 257 NLRB 777 (1981).

lin.[5] The first was whether the guards were employees within the Act's meaning or excluded from coverage because of the purported supervisory, confidential, or managerial nature of their duties. The second was whether, if found to be employees, representation of the guards by the same union already representing their coworkers was so incompatible with their duties in relation to those coworkers that petitions for their representation by an incumbent union should be dismissed. With respect to both issues, the Board's consistent policy was to find the guards to be employees [6] and to permit their representation by incumbent unions.[7] Significantly, there is no case prior to Taft-Hartley in which representation of guards was attacked on the ground that the union seeking their representation *elsewhere* represented nonguards.

The third issue was the impact on both these policies of the widespread militarization of guards employed by employers producing war materiel during World War II. The Board's response to militarization, however, was the same, finding that it did not alter the employee status of the guards or their right to choose, in the words of Section 7, "representatives of their own choosing." [8]

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[5] *NLRB v. Jones & Laughlin Steel Corp.*, 331 U.S. 416 (1947), revg. 154 F.2d 932 (6th Cir. 1946). The Board's Decision and Direction of Election is reported at 49 NLRB 390 (1943). The Board's Order is reported at 53 NLRB 1046 (1943). The Sixth Circuit's original order denying enforcement is reported as amended at 146 F.2d 718 (6th Cir. 1945). The Supreme Court's grant of the Board's petition for certiorari, vacatur, and remand to the Sixth Circuit is reported at 325 U.S. 838 (1944).

[6] See, e.g., *Bendix Products*, 3 NLRB 682 (1937); *Chrysler Corp.*, 36 NLRB 593 (1941).

[7] See, e.g., *Westinghouse Electric & Mfg. Co.*, 28 NLRB 799 (1940); *R.C.A. Mfg. Co.*, 30 NLRB 668 (1941).

[8] The first reported case on the impact of militarization is *Chrysler Corp.*, 44 NLRB 881 (1942). See especially *Dravo Corp.*, 52 NLRB 322 (1943).

In *Jones & Laughlin*, on application of the Board for enforcement of an Order premised on these principles, the Sixth Circuit denied enforcement finding that militarization did not alter the employee status of the guards but that it did alter the appropriateness of the unit. The finding was *not* based merely on a perceived conflict of loyalties in the representation of guards by a "mixed" union. The dispositive consideration was not even a perceived conflict of loyalties in the representation of the guards by the same union which represented Jones & Laughlin's production employees. It was, instead, the guards' militarization (146 F.2d at 721-723):

> We think that . . . the Board failed to give adequate consideration to the national welfare and this is a fundamental error. . . . [T]he Board failed to give effect to the fact that from December 11, 1941, the country was at war . . . [and] the further unquestionable fact that [the] respondent was engaged in the production of war material and other necessities for the armed forces and the national war effort. . . .
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> . . . .
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> The national welfare is of supreme importance and especially is this true in time of war. The evidence reflects the deep concern of the Government for the . . . protection of [the respondent's plant] and for the integrity and volume of [its] products. . . .
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> . . . .
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> When [the union was] selected as bargaining [agent] for the plant protection employees, these employees might in an effort to discharge their duty to their employer find themselves in conflict with other members of their Union over the enforcement of some rule . . . or upon the other hand, in conflict with the Federal Government because of fealty to the Union at the time of a dispute involving the public interest.

The impact of militarization in the initial Sixth Circuit decision in *Jones & Laughlin* is not debatable. When

the case went to the Supreme Court, on conclusion of the war and the demilitarization of the guards, the Court remanded the case to the Sixth Circuit for reconsideration *because of* demilitarization.

As the majority notes, however, subsequent to demilitarization, but prior to reconsideration, the guards in *Jones & Laughlin* had become auxiliaries of the Cleveland police force, so that, in the Sixth Circuit's words, "[t]he precise question [on review was] not whether the plant guards should be permitted to organize, but whether the peculiar classification into which they [fell made] it improper for the Board to permit their organization by the same union which represent[ed] the production employees." [9]

If then Section 9(b)(3) were read as no more than codification of the Sixth Circuit's opinion in *Jones & Laughlin*, it might be construed as extending only to situations in which the guards sought to be represented shared some connection with public or governmental entities. The words of Section 9(b)(3), however, are far broader than that, as is other legislative history. Then again, if we were to read it as codification of one aspect of *Jones & Laughlin*—simultaneous representation of both guards and their coworkers—we might construe the words of Section 9(b)(3) as only slightly different from what they are, prohibiting instead the certification of a labor organization which directly or indirectly admits "to membership . . . coemployees of guards." This reading has uniform support in the legislative history:

> [W]e provided that [plant guards] could have the protection of the Wagner Act only if they had a union separate and apart from *the union of the general employees.*[10]

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[9] 154 F.2d at 934.

[10] 2 Leg. Hist. 1544 (LMRA 1947) (remarks of Sen. Taft).

> Although this case [the Sixth Circuit's holding in *Jones & Laughlin*] was recently reversed by the Supreme Court . . . four of the Justices agreed with the Circuit Court that this was an abuse of the discretion permitted to the Board under the Act. *One of the members of the Board has also expressed this view in a number of dissenting opinions.*[11]

Either reading, though narrowing the scope of Section 9(b)(3), at least could find some support in its legislative history. Here, the majority enlarges the scope of Section 9(b)(3) without any such support. Obviously, in enacting Section 9(b)(3) Congress was concerned with potential conflicts of loyalties. But Section 9(b)(3) is Congress' response to that concern and the response does not reflect a determination to prohibit a voluntarily recognized mixed union, or the employees it represents, from asserting rights under the statute shared by other unions and employees. The limitation on them is the one Congress put in Section 9(b)(3).

The result here is not only far beyond either the words of Section 9(b)(3) or its legislative history, it envisions a form of collective bargaining that is foreign to the statute as a whole. The majority's construction of the section ascribes to Congress an intention to permit an employer to voluntarily recognize a mixed union as representative of its guards subject to that union's, and those guards', understanding that the employer could walk away from the relationship perhaps at any time and certainly at any contract's end. Even if limited to the latter context, such voluntary bargaining is contrary to the stability of collective-bargaining relationships promoted by the statute.

The Charging Party here does not seek to have the Board certify it. It seeks, instead, to have the Board

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[11] The reference apparently is to former Member Reynolds. Compare *id.* at 1541 with 12 NLRB Annual Report 23 fn. 95 and cases there cited.

determine whether the Respondent lawfully withdrew recognition from it. The test for that, whether the recognition was voluntarily extended or not, is whether the Respondent had reasonable doubt about the union's continuing majority status based on objective considerations.[12] The Respondent seemingly concedes that is not the case. Indeed, as the judge found, this Respondent withdrew recognition in response to a bargaining stalemate. Neither Section 9(b)(3) nor its legislative history makes that an exception to the principles governing when recognition may be withdrawn.[13] I would find the withdrawal to be in violation of Section 8(a)(5).

Dated, Washington, D.C. May 18, 1984

DON A. ZIMMERMAN, Member
NATIONAL LABOR RELATIONS BOARD

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[12] See, e.g., *NLRB v. Windham Community Memorial Hospital*, 577 F.2d 805 (2d Cir. 1978); *Club Cal-Neva*, 231 NLRB 22 (1977).

[13] Under Sec. 9(b)(1) professional employees are entitled to a separate vote on whether they wish to be included in a bargaining unit with nonprofessionals. The Board may not decide that any unit is appropriate if the professionals have not been included on that basis. That is to say, the prohibition running to the Board is to its "deciding the unit is appropriate." In *ITT*, 159 NLRB 1757, the employer withdrew recognition from a mixed unit of professionals and nonprofessionals. In other words, it was seeking to assert the professionals' 9(b)(1) privilege. *Utah Power Co.*, 258 NLRB 1059 (1981), on the other hand, was a unit case in which the professionals sought the separate unit that is theirs to seek under Sec. 9(b)(1). The two cases are in no way inconsistent. Nor are they relevant here despite my colleagues' discussion of the two cases and their unfounded suggestion that a respondent withdrawing recognition is the "beneficiary" of Sec. 9(b)(3). Sec. 9(b)(1) gives professionals, but not employers, the right to a separate vote. Sec. 9(b)(3) does not give an employer the right to withdraw recognition. It prohibits a union from receiving Board certification of it as the representative of a guards' unit when that union is a mixed one.

APPENDIX D

JD-98-82
New York, NY

UNITED STATES OF AMERICA BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Cases 2-CA-17305
2-CA-17394

WELLS FARGO ARMORED SERVICE CORPORATION

and

TRUCK DRIVERS LOCAL UNION NO. 807, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

and

FRED M. CAPUTO, An Individual

Stephan Appell, *David Pollack* and *Rochelle Kentor*, *Esqs.*, for General Counsel.

Avrum Goldberg and *Mark Fischer*, *Esqs.*, for Respondent Employer.

J. Warren Mangan, *Esq.*, for Charging Party Union.

DECISION

FRANK H. ITKIN, Administrative Law Judge. The unfair labor practice charges in the above consolidated cases were filed on June 11, and July 15, 1980. A complaint issued on October 21, 1980, and was later amended at the hearing. The case was tried in New York City on April 27 and 28, July 13, 14, 15, 16 and 17, 1981, and

on January 6 and 7, 1982. Briefly, General Counsel contends that Respondent Wells Fargo violated Section 8(a)(5) and (1) of the National Labor Relations Act by withdrawing recognition from Charging Party Local 807 on or about June 2, 1980, as the collective bargaining agent of an appropriate unit consisting of the Company's "employees working on armored trucks and * * * employed in the meter collection operation at Respondent's facilities" in New York and New Jersey. General Counsel further contends that the strike, which had started on or about April 14, 1980, was prolonged by the Company's unfair labor practices and, consequently, became an unfair labor practice strike on or about June 2, 1980. Respondent Wells Fargo denies that it has violated the Act as alleged. In particular, counsel for Respondent argues that the unit employees are "guards" under Section 9(b)(3) of the Act; that Local 807 admits to membership employees other than "guards"; and that, therefore, the Company "retains the right to end [its] relationship" with Local 807 whenever "it becomes dissatisfied or objects"—it "can pull out" of the bargaining relationship "anytime." Alternatively, counsel for Respondent asserts that a "conflict of loyalties", either actual or potential, arose between the parties and employee-members thereby permitting the Employer to withdraw recognition from Local 807 under Section 9(b)(3) of the Act.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by counsel, I make the following findings of fact and conclusions of law:

Findings of Fact

Respondent Company provides armored car services for the transportation and delivery of monies, securities and other valuables. Respondent is admittedly an employer engaged in commerce as alleged. Charging Party Local 807, affiliated with the International Brotherhood Of

Teamsters, Chauffeurs, Warehousemen And Helpers Of America, is admittedly a labor organization as alleged. On July 16, 1948, Local 820, also affiliated with the Teamsters International, was certified by the Board to execute a Union-security agreement for Respondent's employees in a unit including "all chauffeurs, custodians and guards working on trucks in its armored car division." See G.C. Exh. 21. Respondent and Local 820 thereafter engaged in a bargaining relationship and executed a series of collective bargaining agreements. The most recent contract between Respondent and Local 820 was effective from March 14, 1977 to March 16, 1980. See G.C. Exh. 2.[1]

On or about June 18, 1979, while the above contract was in effect, the Company was notified that Local 820 "has been merged into Local 807 * * * pursuant to a directive by the General Executive Board of the International Brotherhood of Teamsters * * *, effective June 16, 1979 * * *", and that "Local 807 [is] the successor to all rights and duties in the 1977-1980 collective bargaining agreement * * *." See R. Exh. 13. (Also see G.C. Exh. 13, R. Exhs. 16 and 17.) Representatives of Local 807 promptly met with representatives of the Company. Thereafter, Local 807 proceeded to administer the outstanding collective bargaining contract and, commencing about February 26, 1980, held some 14 bargaining sessions

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[1] The 1977-1980 contract recites (G.C. Exh. 2, page 2):

* * * *

> The Employer agrees to recognize the Union as the sole and exclusive bargaining agent for all of its employees working on its armored trucks and for those who are employed in its meter collection operation. This Agreement shall apply only to the aforesaid employees working out of the offices of the Employer in the metropolitan area of New York City, New York, and including Westchester, Nassau, Suffolk, Orange, Putnam and Rockland Counties in New York, and Essex, Bergen, Hudson, Passaic, Union and Morris Counties in New Jersey.

* * * *

with the Employer in an attempt to reach a new agreement.[2] The Company and Local 807 were unable to resolve substantial economic and non-economic issues and, as discussed below, the Company made a "final offer" to the Union at the April 11 bargaining session. The Local 807 membership unanimously rejected this "final offer" on April 13 and a strike ensued. Then, by letter dated June 2, 1980, the Company notified Local 807 (G.C. Exh. 11):

* * * *

> Please be advised that Wells Fargo Armored Service Corporation is, as of the date appearing hereinabove, withdrawing the voluntary recognition accorded Local 807 IBT as collective bargaining representative of the armored guard employees at Well Fargo's New York City and Linden, New Jersey facilities.

* * * *

The testimony and related documentary evidence pertaining to this withdrawal of recognition and the strike are summarized below:

Joseph Votta, recording secretary for Local 807, testified that Respondent Company was notified of the transfer of authority from Local 820 to Local 807 "shortly after the takeover" during June 1979; that Local 807 promptly began representing the Company's New York and New Jersey employees in the unit as provided in the 1977-1980 contract; that he met with various representatives of the Company during June or July 1979 in order to discuss the change in authority from Local 820 to Local 807; and that the Company did not question or dispute Local 807's right or authority to represent the unit employees. Votta recalled that Local 807, shortly after the

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[2] The negotiating sessions between the Employer and Local 807 were held on February 26, 27, March 5, 11, 12, 20, 21, 25, 26, April 2, 11, 24, May 19 and 28, 1980. During these negotiations, the parties "stipulated" that the above contract be "extended" and that "all terms and conditions agreed upon in any successor agreement * * * will be retroactive to March 17, 1980 * * *." See G.C. Exh. 6. (Also see G.C. Exhs. 3, 4, 5, 7, 8, 9 and 10.)

takeover, received from the Company Union dues previously withheld from the employees. See C.P. Exhs. 2 and 3. In addition, Votta recalled that he commenced processing grievances with the Company "on a regular basis" and that pending arbitration proceedings—started earlier by Local 820—were "carried over" by Local 807 and completed. See G.C. Exh. 16 and C.P. Exh. 4.

Further, Votta testified that he participated in the negotiations with the Company for a new contract, starting during late February 1980. The parties bargained over economic and non-economic issues. Tentative agreements were reached pertaining to arbitration, bereavement leave, health coverage and various "withdrawals" of proposals. Local 807 and the Company, during these negotiations, twice stipulated to an extension of the 1977-1980 contract and agreed to "retroactivity." See G.C. Exh. 6. However, as Votta recalled, at the April 11 bargaining session, Company vice president Timothy Hughes announced that "we don't have to go any further; this is our last and final offer; and that's it." Votta took the Company's "last and final offer" back to the membership who, on April 13, unanimously voted to strike. Picketing started the following day, April 14.

Subsequently, about May 28, Votta attended a bargaining session between the parties. Votta testified:

> * * * [W]hen it first started off we were asked the question if there was any room to move, and we said yes there's always room to move. * * * [They, the Company,] asked in which way * * * and * * * we said we would move to 80, 70 and 70 [from 90, 80 and 80 cents in hourly wage increases during the first, second and third years of the proposed contract.]
>
> * * * *
>
> [They] asked for a caucus and they went into another room * * * they were in there quite a while * * *.

Ultimately, as Votta recalled, Hughes stated that "it's over with" and "that was the end of the meeting." Thereafter, on June 2, Votta noted, "we got a copy of a letter stating that * * * they no longer recognized 807."

Michael Kelley testified that he was a member of Local 807's negotiating team; that he attended the bargaining sessions between the parties in 1980; and that at no time during these negotiations was "the question raised by Wells Fargo regarding its recognition of Local 807 as collective bargaining representative * * *." Kelley recalled how the Local 807 membership, on or about April 13, 1980, unanimously rejected the Employer's "final offer." During the ensuing strike, Kelley received a copy of G.C. Exh. 14, a letter dated April 17 which was mailed or distributed by Respondent to its striking employees, stating, *inter alia*:

* * * *

> Collective bargaining between your Union and your Company began on February 26, 1980, and some ten additional meetings were held until the talks concluded on April 11, 1980.
>
> During the course of these talks, the Company's representatives explained to the Union how, in the past, the condition of the business had so deteriorated that the Company's New York branch had been losing money for several years. These losses were due primarily to the ever-increasing number of non-Union competitors entering the armored car business in New York.
>
> Because of this serious condition, it was necessary for the Company to ask the Union and you to agree to changes in the contract—among them a reduction in the weekly guarantee from 42 to 40 hours, a deletion of the pick of runs and a change from mandatory 3-person crews to a system which would allow us to perform new business in a safe and secure manner with 2-person crews.

Moreover, due to the poor business conditions in New York City, at the New York branch, it was necessary for the Company to make a wage offer calling for holding-the-line on any wage increases for the first year of the contract, and an average wage adjustment of 62¢ per hour in the second year and 58¢ per hour in the third year of the new Agreement.

Since at the Linden branch the business picture was not quite so grim, the Company was able to offer an average wage adjustment in the first year of 33¢ per hour, with an increase of 65¢ per hour in the second year and an additional 61¢ per hour in the third year.

At both locations, the Company did agree to the adoption of the Teamster Welfare Plan in the contract's first year and to making improvements in that Plan in the second year of the Agreement.

* * * *

We urge you, therefore, to support your Company and your own future. Return to your Union officers and tell them you want to return to work. Tell them your're willing to make an investment in your future by accepting the Company's last offer for a new labor contract.

* * * *

Kelley similarly received from the Company a copy of G.C. Exh. 15, a letter dated April 24, stating, *inter alia*:

* * * *

Since the strike continues, effective Thursday May 1, 1980, Wells Fargo will no longer bear the economic burden of making benefit payments for [the enumerated health and insurance plans.] * * * We urge you to return to your Union officials, tell them you want the strike to end, and that you want to return

to work. In this way, cancellation of your benefits can be avoided * * *.[3]

Robert Relay testified that he is the fund manager of the Local 807 Armored Car Pension Fund; that previously this fund was known as the Local 820 Armored Car Pension Fund; and that this change was made as a result of the meeting of fund trustees on or about July 17, 1979. See G.C. Exh. 19. (Also see G.C. Exhs. 20, 17 and 12.) Relay recalled that, after the fund was "converted to the 807 Pension Fund" in July 1979, Respondent "participated" by, *inter alia*, "contributing." The last "contributions" were made by the Company in June 1980 for the "period of the first two weeks in April."

Respondent Wells Fargo attempts to justify its withdrawal of recognition from Local 807 in June 1980 by now claiming, *inter alia*, that Local 807, unlike Local 820, was not sufficiently "security minded." See, generally, Transcript, p. 402. In support of this and related contentions, Timothy Hughes, vice president in charge of the Employer's industrial relations, cites, among others, the following "reasons" which assertedly privileged such withdrawal: Local 820, unlike Local 807, was comprised entirely of "guards"; Local 820 did not challenge the "reasonableness" of its security rules; Local 820 expressed a "policy" that "they would cross a picket line"; Local 807's president Joseph Mangan had assured Hughes during an early July 1979 meeting that "he intended to establish a kind of separate division within Local 807 to be entirely concerned with the armored car industry * * *" and "there would be no changes * * * with respect to the Pension Plan * * *" or "Pension Committee"; there were, following the takeover by Local 807 in 1979, unfair

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[3] Also see the testimony of striking employee John Kelley, who later received a copy of G.C. Exh. 22, a telegram from the Employer dated June 5, 1980, stating, *inter alia*, that "* * * effective June 2, 1980, Wells Fargo * * * withdrew its voluntary recognition of Local 807 * * *."

labor practice charges and/or petitions filed by employees who opposed the merger or takeover; Local 807, during the 1980 bargaining sessions, "did not want to expand the use of polygraph" tests of employees as provided in the 1977-1980 contract; Local 807 similarly did not want "to expand the no-strike language to include sympathy strikes" or to include "management rights" language; and members of Local 807 engaged in "misconduct" during their strike. Hughes claimed that—after having been requested by Local 807 to bargain for a new contract during early 1980 (see R. Exh. 40)—he "had discussions with the officers of the Company" concerning the "chain of events that had occurred up to that point * * *",

> and, at that point, did discuss the possibility of terminating the relationship, but we said that we would at least go in and hear what they had to say with respect to the labor agreement.

Elsewhere, Hughes acknowledged that Local 820, in the past, had challenged in grievance proceedings the discipline of unit employees predicated upon Company security rules; that Local 820's 1977-1980 contract generally permits employees to refuse to cross a lawful primary picket line and "to arbitrate the reasonableness" of the Employer's work rules (see G.C. Exh. 2, pp. 54 and 21); that the Employer did not "challenge" or protest Local 807's "merger" or authority to represent the unit employees; that he "never told Local 807 that [he was] withdrawing recognition because it did not set up a separate armored car division" or notified Local 807 of the "possibility of ending the relationship depending upon what happened in [his] dealings with Local 807"; that he never informed Local 807 that he was "conditioning recognition on what Local 807 might propose or demand in the bargaining relationship"; that he never advised Local 807 that "he would not continue recognizing the Union or [was] considering * * * not continuing because

they had changed the trustees of the Pension Plan * * *"; that he, in fact, as a trustee, voted "to change the name of the Pension Fund from" Local 820 to "Local 807 Armored Car Pension Fund"; that Local 807 "maintains a separate Pension Fund"; that Local 820, like Local 807, struck for its last contract and, in fact, Local 820 had engaged in a "wildcat strike"; that he did not witness any "misconduct" on the part of a Local 807 representative during the 1980 strike; and that "at no time" during the 1980 negotiations "did the Employer inform [Local 807] that it intended to withdraw recognition or was considering withdrawing recognition from the Union."[4] Hughes was asked with reference to his "last offer" to Local 807: "* * * you related to the Union if they acquiesce in that proposal there would be a collective bargaining agreement" "if they agreed to [the Employer's] proposal?" Hughes replied: "yes." Elsewhere, Hughes testified:

> Q. Is it fair to state Mr. Hughes, that had the employees accepted the Company's last offer as the Company implored them to do in G.C. Exh. 14, that the Company would have continued recognition?
>
> A. I don't think it is fair to state that.

Hughes further claimed that on June 2, 1980, when the Employer withdrew recognition from Local 807, he met with Teamsters International representative Albert Barlow and then "laid out [the] whole chain of events * * *" resulting in the Company's decision to withdraw recognition. Hughes assertedly "explained the whole series of reasons." Elsewhere, Hughes acknowledged that his prehearing affidavit, given to a Board agent on June 9, 1980, only states:

* * * *

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[4] Also see the testimony of J. Warren Mangan, counsel for Local 807, adduced on rebuttal, pertaining to the positions of the parties prior to the withdrawal of recognition on June 2, 1980.

> On 6/2/80, prior to my mailing of the letters to the Union, I met with Albert Barlow an International Rep. for the Teamsters for the Eastern Conference, in Arlington, Virginia. I had dealt with him before on different contract matters, when the guards were under Local 820's jurisdiction. I informed him that the Company was withdrawing recognition from Local 807 because the Union admitted both guards and non-guards to membership. "He said he'd notify his superiors", end of quote.
>
> * * * *

There is no other reference to additional "reasons" in this affidavit.[5]

In addition, Hughes also claimed that he had heard of an incident during April 1980, where Local 807 employee-members refused to cross a picket line of a customer, Payomatic. Hughes, however, had no personal knowledge of this alleged incident. Hughes admittedly never cited this incident to Local 807 as a reason for withdrawing recognition in June 1980. And, Local 807 representative Votta explained, on rebuttal, that his Union in fact had picketed "Rapid Armored Car" from about October 1979 through April 1980, and not Payomatice, because Rapid refused "to recognize" or "bargain" with Local 807. Rapid and Payomatic were proximately located at the particular site; Rapid transported valuables and also serviced Payomatic's check-cashing operations; and Rapid had its trucks parked at this site. Wells Fargo branch manager John Isaacs understood "that it was Rapid * * * they were picketing * * *." (Also see the testimony of Union representative Joseph

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[5] I note that, although Local 820 only represented "guard employees", there is no real dispute here that, because of its affiliation with the Teamsters International, it would at all times pertinent to this sequence be treated under Section 9(b)(3) as a so-called mixed guard Union. See, generally, Transcript p. 117 and G.C. Exh. 18, p. 2.

Votta, and Company representatives John Isaacs and Joseph Prisciandaro pertaining to Local 807's "ambulatory picketing" of Wells Fargo during the 1980 strike and Transcript pp. 883-885.)

Edward Gamber, vice president in charge of security for Wells Fargo, claimed, *inter alia*, that, in his "opinion", the "refusal of an armored car employee * * * to cross a picket line * * * creates a security problem * * *." However, as noted, the 1977-1980 contract between the Employer and Local 820 permits unit employees to honor lawful primary picket lines and Local 820 never "modified" this provision. Gamber was also asked if unit drivers represented by Local 820 had "refused to cross picket lines at any time that [he] was associated with the Employer?" Gamber acknowledged: "That probably occurred, I just never had no specific recollection." [6]

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[6] Also see, generally, the testimony of Daniel Petrie and Joseph Hurley, unit employees, concerning picket lines which they had refused to cross when Local 820 represented the employees. Company dispatcher William Stratford attempted to controvert the above testimony. At one point, however, Stratford testified:

> Q. Mr. Stratford, to your knowledge, if employees refused to cross a picket line, and therefore did not make a delivery or pick-up at a given customer, would that be reflected on documents in the Company records?
>
> A. Well, it would be reflected in our billing records, if we didn't service the customer, we wouldn't bill them for the service, so it would be reflected.
>
> Q. Would there be any specific notation, employees did not make pick-up or delivery because of picket line strike—would be reflected on the Company records?
>
> A. Yes.
>
> * * * *
>
> Q. And you have seen such notations on records, on route sheets, haven't you?
>
> A. Yes.

[Continued]

Respondent's Exhibit 42 is a list of the names of employers who, since Local 807's takeover of Local 820's contract in June 1979, have had collective bargaining agreements with Local 807. There are approximately 400 names on this list. It is undisputed that Local 807 represents both guard and non-guard employees of these various employers. Only one of these named employers presently (at the time of hearing) is serviced by Wells Fargo —American Banknote Company. There are four other employers named on this list who were previously serviced by Wells Fargo and are no longer serviced by Wells Fargo. See, generally, the testimony of Kevin Cioffi, the Employer's district sales representative.

Finally, testimony and related documentary evidence was adduced with reference to the nature of the 1980 strike. Thus, Union representative Votta testified that on or about June 3 or 4, 1980, following a telephone conversation with the Union's attorney pertaining to the Employer's withdrawal of recognition, he instructed and caused the members to change the language on the existing picket signs. The signs were then changed to state, *inter alia*, that "Wells Fargo refuses to bargain" and was "Unfair." Votta thereafter observed pickets carrying these new signs. Votta, however, acknowledged that periodically old signs would be used and he would instruct the pickets involved "to change it." (Also see the testi-

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[6] [Continued]

Q. Can you tell us how many times that you've seen them on route sheets?

A. I have no idea.

Q. Would you say more than 10?

A. No.

Q. Do you remember any specific times that you saw such notations?

A. No.

* * * *

Stratford's testimony was, at times, confusing and contradictory.

mony of Joseph Hurley, Fred Caputo, Michael Kelly, Daniel Petrie and Michael Maguire explaining the changes in the picket signs.) On the other hand, Company representative John Isaacs claimed, *inter alia*, that he saw old "on strike" signs about August 1980 and that the Union's signs were "first" changed during this hearing in 1981.

The sequence of events, as detailed above, is in large part uncontroverted and based upon undisputed documentary evidence of record. There are, however, conflicts in the testimony of witnesses attempting to explain this chronology. On the entire record, including the demeanor of the witnesses, I am persuaded that the testimony of Joseph Votta, Michael Kelley, Robert Relay, John Kelley, J. Warren Mangan, Daniel Petrie, Joseph Hurley, Fred Caputo and Michael Maguire, as quoted and referred to above, correctly and truthfully reflects the entire transaction culminating in the strike and the Employer's withdrawal of recognition from Local 807. Their testimony is in significant part mutually corroborative. Their testimony is also corroborated in large part by documentary evidence of record and, further, is substantiated by testimony of Timothy Hughes, John Isaacs, Joseph Prisciandaro, Edward Gamber and William Stratford. Insofar as the testimony of Votta, Michael and John Kelley, Relay, Mangan, Petrie, Hurley, Caputo and Maguire differs from or with the testimony of Hughes, Isaacs, Prisciandaro, Gamber and Stratford, I find here that the testimony of the former witnesses is a more complete, reliable and trustworthy account of the pertinent facts. The testimony of Hughes, Gamber, Isaacs, Prisciandaro and Stratford was, at times, incomplete, vague, contradictory and evasive.

In particular, as discussed further below, I do not credit Hughes' assertions pertaining to the Employer's "reasons" for withdrawing recognition from Local 807. I find here that these belated, eschewed, shifting and con-

tradicted "reasons" for the Employer's summary withdrawal of recognition on June 2, 1980, are afterthoughts now offered in an attempt to justify the Employer's action. I find that the Employer's June 2 decision was, in fact, predicated solely upon economic considerations, namely, Local 807's refusal to accept the Employer's "final offer." See G.C. Exh. 14, quoted *supra*. In short, the Employer's belatedly claimed "security" and "conflict" related "reasons" for refusing, after about one year, to bargain or deal any further with Local 807 are, on this record, plainly pretextual, and are not the real or true reasons for the action taken. Further, I do not credit Isaacs' related claim that the Union first changed its picket signs "on strike" to "unfair" during this hearing in 1981. I credit instead Votta's substantiated and corroborated testimony, as detailed above.[7]

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[7] Upon reconsideration, as requested by counsel for Respondent in his post-hearing brief (pp. 8-10), I would receive previously rejected R. Exhs. 10 and 11 into evidence. Upon this entire record, they are sufficiently authenticated and relevant. Compare, however, G.C. Exh. 2, p. 54, the 1977-1980 contract language between Local 820 and Respondent pertaining to picket lines and the testimony discussed above. In addition, upon reconsideration, as further requested by counsel for Respondent in his post-hearing brief (pp. 14-16), I adhere to my ruling which, in effect, refuses to allow Kevin Cioffi, a Company district sales representative, to speculate who the Employer's "prospective customers" may be (Tr. pp. 905-925). I note that, at one point in his testimony, Cioffi acknowledged that his "use of the word prospective customer is not based on any ongoing negotiations or sales talk between the prospective customer and [his] Employer" (Tr. 909). Elsewhere, counsel for Respondent and then Cioffi generally claimed that Cioffi "has called upon" "in some instances" these so-called "prospective customers" (Tr. 914-915).

Finally, I note that counsel for Respondent, in his post-hearing brief (p. 26), states that, "[d]uring the strike, members of Local 807 engaged in serious strike misconduct * * *." The credited evidence of record does not support this assertion. Hughes admittedly had no direct knowledge of such misconduct. Hughes admittedly did not cite this alleged "reason" to Local 807 for withdrawing

Discussion

Section 9(b)(3) of the National Labor Relations Act was enacted in 1947. It provides, in pertinent part:

> The Board shall decide in each case * * * the unit appropriate for the purposes of collective bargaining * * * *Provided*, That the Board shall not * * * (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard * * * but no labor organization shall be certified as the representatives of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

The impact of this language upon the statutory rights of "guard employees" has been the subject of much commentary by the Board and the Courts. The United States Court of Appeals for the Sixth Circuit stated in *N.L.R.B.* v. *White Superior Division, White Motor Corp.*, 404 F. 2d 1100 (C.A. 6, 1968), as follows:

> * * * [We] think it is clear that Section 9(b)(3) does not operate to prevent guard employees from joining a labor organization, and this principle extends to labor organizations which also represent non-guard employees * * *. Indeed, the real significance of Section 9(b)(3) is the restrictions which it imposes on the Board. Specifically Section 9(b)(3) provides two things: (1) the Board may not determine that a unit is appropriate for pur-

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recognition prior to June 2, 1980. Indeed, the testimony of Company representatives Isaacs and Prisciandaro with reference to, *inter alia*, Local 807's "ambulatory picketing" of Respondent's trucks and the claimed "commotion" which resulted, does not show" serious strike misconduct." Consequently, this alleged "reason" for Management's June 2 determination, like the others referred to above, does not withstand close scrutiny and serves only to further bolster the finding that such "reasons" are plainly pretextual.

poses of collective bargaining if the unit includes both guards and non-guards; and (2) the Board may not certify a union as bargaining agent for guards if that union represents both guards and non-guards.

If guard employees do join a union which also represents non-guards, their membership is not unlawful, and in fact an employer may, if it wishes, recognize such a union for purposes of collective bargaining.

Since membership by guard employees in a union which also represents non-guards is not unlawful, it would be an unfair labor practice for an employer to take discriminatory action against guard employees on account of such membership * * *.

The Court made "it abundantly clear that, absent [the employer's] consent, the [mixed-guard on nonqualified union] may not represent the guards." The Court, however, explained:

* * * *

It is true that the I.A.M. [the mixed-guard union] could never be certified as bargaining agent for the guards, but this does not change the fact that the guards have a right under Section 7 of the Act to be members of the I.A.M. To hold otherwise would attribute too much to certification. It would, in effect, be saying that no labor organization has rights under the Act save a certified one. Certification gives an organization which achieves it additional rights, not all its rights. See *United Mine Workers of America* v. *Arkansas Oak Flooring*, 351 U.S. 62, 70-72 76 S. Ct. 559, 100 L.Ed. 941 (1956); *Brooks* v. *N.L.R.B.*, 348 U.S. 96, 75 S. Ct. 176, 99 L.Ed. 125 (1954); *N.L.R.B.* v. *Kobzritz*, 193 F. 2d 8 (1st Cir. 1951); § 9(c)(3); National Labor Relations Act, 29 U.S.C. § 159(c)(3) (1964).

* * * *

More recently, in *Bally's Park Place, Inc.*, 257 NLRB No. 132 (1981), the Board similarly stated:

> * * * The Act deprives a nonqualified [mixed-guard] union only of the benefits of certification. Guards have the right to designate as their bargaining agent a union which the Board is proscribed from certifying. By permitting a nonqualified intervenor to appear on the ballot, we will be acting in accordance with Section 9(b)(3) and will be contributing to stable labor relations by allowing employees to express fully their wishes as to a collective bargaining agent. Thus, we hold that the statutory proscription in Section 9(b)(3) against certifying labor organizations to represent "guard units" does not prohibit putting such labor organizations on the ballot and certifying the arithmetic results when the election is won by such organization * * *.

In like vein, the Board, in *Wm. J. Burns Int'l Detective Agency, Inc.*, 134 NLRB 451 (1961), reasoned that "a contract unit comprised exclusively of guards is not invalidated merely because the representative of that unit admits to membership or is affiliated with an organization which admits to membership non-guard employees. Accordingly, we perceive no basis in the instant case for withholding the application of our normal contract bar rules. The application of these rules is not contingent on a prior certification * * *." Also see *Wm. J. Burns, etc.*, 138 NLRB 449, 452 (1962).

And, in *Amoco Oil Company*, 221 NLRB 1104 (1975), the Board ordered the employer, *inter alia*, to notify the mixed-guard or nonqualified union "that it will recognize and deal" with the union's designated representative "concerning the negotiation and administration of the parties' collective bargaining agreement and the handling of grievances and other matters relating to rates of pay, wages, hours of employment, and other terms and conditions of employment." The Board explained:

* * * *

We particularly note that the respondent voluntarily recognizes the union, which is the certified representative of its production and maintenance employees, as the representative of its plant guards. The union cannot be certified by this Agency as the representative of plant guards because it admits other employees to membership; but a plant guard unit is appropriate and the respondent does not question the union's status as the representative of either unit. This relationship, in one form or another, has endured for almost 40 years and there is no indication that the respondent is dissatisfied with it; it has not attempted to alter it and has voiced no objection to it here.

Admitting the union's status as the collective-bargaining representative of the two units of its employees, and without attacking the bargaining relationship, the respondent claims the right to refuse to deal with an individual whom its production and maintenance employees have elected to represent them on behalf of the union. Congress has given to employees the exclusive right to select their own representatives, and once the unit and a bargaining representative for it is validly recognized by the respondent, respondent cannot refuse thereafter to deal with the individuals selected by the employees as their spokesmen absent some statutory or other legal impediment. None exists here, and as respondent has not demonstrated any legally acceptable justification for its refusal to recognize the individual selected, its refusal is in violation of Section 8(a)(5) of the Act.

As the above cases show, and counsel do not seriously disptue here, an employer, having voluntarily granted recognition to a so-called "mixed-guard" or nonqualified union which cannot be certified by the Board under Section 9(b)(3), may nonetheless be held to have impinged

upon the unit employees' rights under Sections 7, 8(a)(1), 8(a)(3) and even Section 8(a)(5) of the Act. Accordingly, it is settled that an employer, like Respondent, was not obligated to recognize initially or *de novo* Local 807, or its predecessor Local 820, as the collective bargaining agent of its "guard employees."[8] However, having voluntarily granted such recognition, as this record makes clear, can it then, under the circumstances present here, summarily reverse its decision and refuse to bargain without running afoul of the unit employees' Section 7, Section 8(a)(1) and Section 8(a)(5) rights. A somewhat similar issue was addressed by the Administrative Law Judge in *MRA Associates, Inc.*, 245 NLRB 676 (1979), in part as follows:

> * * * [E]ven if the affiliation existed at the time of the alleged refusal to bargain herein * * *, I would not conclude that Section 9(b)(3) privileged respondent to refuse to bargain with and to withdraw recognition from the union * * *.
>
> [T]his legislation has never been interpreted to deny validity to bargaining units where the parties have voluntarily agreed to representation in such units * * *. To allow respondent to avoid its bargaining obligation with the union in this case simply because the union is affiliated with * * * a non-guard union would be an unduly mechanistic application of the law, particularly where, as here, [the non-guard union] does not represent any of respondent's employees * * * [citing *Burns* and *Amoco, supra.*]

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[8] General Counsel and Respondent do not seriously controvert, and this record establishes, that Respondent's unit employees are "guards" under Section 9(b)(3); and Local 807, like Local 820, is a mixed-guard or nonqualified union, as discussed above. See *Armored Motor Service Co., Inc.*, 106 NLRB 1139 (1953) and *Drivers, Chauffeurs, Warehousemen, etc.*, 553 F.2d 1368, 1372-1374 (C.A. D.C. 1977).

The Board, in *MRA*, *supra*, noting that the "affiliation" with the non-guard union "ended" before the relevant time period and therefore is no defense to a refusal to bargain charge, stated: "Accordingly, we find it unnecessary to pass upon the Administrative Law Judge's discussion of whether, if the affiliation existed at the time of the alleged unfair labor practices, respondent could lawfully have refused to bargain based on that affiliation."

However, the Board, with Court approval, has dealt with analogous and related issues and contentions. Thus, in *International Telephone And Telegraph Corp.* v. *N.L.R.B.*, 382 F. 2d 366 (C.A. 3, 1967), the Court, in agreement with the Board, stated:

> The Board found that the petitioner's withdrawal of recognition of the union as representative of the professional employees violated section 8(a)(5) and (1) of the Act. In reaching its decision, the Board assumed that the failure to provide a separate election for the professional employees in 1951 made that election illegal. See *Leedom* v. *Kyne*, 1958, 358 U.S. 184, 79 S. Ct. 180, 3 L.Ed. 2d 210. But to concede that point is not to say that every unit composed of professionals and non-professionals originally formed without a separate election is invalid forever. Though section 9(b)(1) prohibits the Board from designating a mixed unit without holding the requisite election of professionals, nothing in the language of the Act prohibits the relevant parties from maintaining and recognizing such a unit consensually. *Retail Clerks Union Local 324 (Vincent Drugs)*, 1963, 144 NLRB 1247. In our view such a consensual arrangement is presented here. At no time between 1951 and 1964 did either the petitioner or the professional employees challenge the unit or seek its decertification. The petitioner could have brought the question of alleged improper cer-

tification to a head immediately by refusing to bargain in 1951 and litigating the issue before the Board and the courts in an unfair labor practice proceeding. More significantly, even after the 1958 decision in *Leedom* v. *Kyne, supra,* which put the parties on notice that the original certification was made in error, they negotiated and entered into new contracts in 1959 and 1961, without questioning the composition of the unit. The Board reasonably found that this conduct constituted consent on the part of both parties to a mixed bargaining unit consisting of professional and non-professional employees. * * *

In these circumstances, the error in the original determination of the bargaining unit does not justify the present refusal to bargain with it.

* * * *

Nor can it be said that the petitioner's refusal to bargain was grounded on and justified by good-faith doubt as to the union's majority within the existing unit.

* * * *

The Board permissibly found that the petitioner's refusal to bargain with Local 400 as representative of the entire group of employees in the engineer-technician unit constituted an unjustified disruption of the bargaining process violative of section 8(a)(5) and (1).

The Board, in *International Telephone, supra,* explained the basis for its Section 8(a)(5) finding, as follows (159 NLRB 1757, 1763-1764 (1966)): "Had the respondent been unwilling to accept the unit on a voluntary basis, opportunities were available to it to test the unit question at the time of the 1959 and 1961 reopenings. It took no steps to do so. * * * Significantly, it was not until after such negotiations [in 1964] had been underway for some time and a strike had occurred, that the respondent decided to withdraw recognition from the

union as the representative of the mixed unit * * *. [We] hold that respondent is estopped at this time from disputing the appropriateness of the unit * * *."

Applying the foregoing principles to the credited evidence of record here, I find and conclude that Respondent Employer, having voluntarily recognized Local 807 as bargaining agent for an appropriate unit of its "guard employees", acted in derogation of the unit employees' statutory rights and its obligation to bargain in good faith when it summarily withdrew that recognition and refused to bargain any further with Local 807 one year later, on or about June 2, 1980. Thus, as detailed *supra*, Respondent Employer accorded Local 807 full and voluntary recognition as bargaining agent for the unit employees immediately following the takeover by Local 807 during June 1979. Local 807 administered the existing contract between the parties. Dues were checked off and forwarded to Local 807. Grievances and arbitrations were processed to completion. And, when the existing 1977-1980 contract expired, the parties voluntarily entered upon negotiations for a new agreement. Indeed, during the 14 bargaining sessions, the parties twice agreed to extend the 1977-1980 contract and to "retroactivity." At no time during this sequence did Respondent Employer assert or warn Local 807 that it was, for any reason, contemplating the withdrawal of the recognition previously granted to Local 807, or earlier to its predecessor Local 820. Consequently, Local 807 and its membership could reasonably believe that the Employer, having voluntarily granted recogntion to Local 807 as it had done for many years earlier with respect to Local 820, would bargain in good faith and fulfill its statutory obligation during the efforts by the parties to reach a new agreement.

However, during the bargaining sessions, it became apparent that the parties were far apart principally on economic issues. At the April 11 bargaining session, the

Employer made a "final offer." The Local 807 membership, at a meeting on April 13, rejected this "final offer" and voted to strike in support of the Union's economic position. A strike ensued. During the strike, the Employer did not claim or warn that it would withdraw recognition. On the contrary, the Employer repeatedly urged the unit employees to get their Union, Local 807, to accept the "final offer" and end the strike. Again, Local 807 and the unit employees could reasonably believe that the Employer would continue to honor at this critical time the ongoing bargaining obligation voluntarily incurred. On May 28, during the strike, the parties met again. Local 807 was asked if there was room for any movement. Local 807 modified its economic position. However, the Employer ended the negotiations and, on June 2, summarily withdrew recognition citing the Union's mixed-guard status as its "reason."

Respondent Employer, under the circumstances present here, was estopped from thus withdrawing the voluntary recognition previously granted to Local 807. Respondent Employer, at no time during this 12-month period, warned or otherwise apprised Local 807 and its membership of such contemplated action. I have, as found *supra*, rejected as afterthoughts and pretexts Management's now asserted "security" and "conflict" related "reasons" for this untimely action. The record shows, in any event, that these alleged "reasons" did not stop the Employer throughout this 12-month period from voluntarily dealing with Local 807 in satisfaction of its statutory bargaining obligation. Indeed, the Employer never claimed a "conflict" or "security" problem or made the various related assertions now advanced. And, as also noted above, these alleged "reasons" for the June 2 withdrawal do not withstand scrutiny. Thus, for example, the Employer claims that Local 807, unlike 820, would not cross picket lines. The 1977-1980 contract with Local 820 permitted the Union to honor a lawful primary picket line.

In like vein, the Employer's claim that Local 807 challenged its security rules is, on this record, without support. Again, the 1977-1980 contract permitted such challenges and, further, Local 820 attacked the discipline given to employees under these rules. Moreover, as for the claimed "conflict", actual or potential, this record does not demonstrate such a basis for the withdrawal here. The one furnished isolated example of such a "conflict" with a customer, Payomatic, was credibly explained as a strike by Local 807 against a proximately located carrier. In any event, none of these alleged and belatedly cited "reasons" were furnished to Local 807 prior to the summary withdrawal of recognition.

Accordingly, I find and conclude that the withdrawal of recognition on June 2 was a violation of Section 8(a)(5) and (1) of the Act. Although counsel seek also to argue that, on one hand, the Employer can withdraw recognition "anytime", or, on the other hand, that the Employer cannot withdraw recognition absent a good-faith doubt of continued majority status, I need not here explore the boundaries of this bargaining obligation voluntarily incurred. In short, I find that the June 2 withdrawal, on these facts, was in derogation of the statutory obligation voluntarily incurred.

Further, I find that the economic strike, then in progress, was converted on or about June 2 to an unfair labor practice strike in protest over the Employer's unlawful action. The unlawful withdrawal of recognition, on this record, clearly prolonged the strike, and it still continues. The picket signs were changed to reflect this protest of unfair conduct. Surely, the settlement of such a strike was delayed by this unlawful withdrawal of recognition. Cf. *Soule Glass and Glazing Co.* v. *N.L.R.B.*, 652 F. 2d 1055, 1079-1082 (C.A. 1, 1981), and cases discussed.

In sum, I find and conclude that Respondent Employer violated Section 8(a)(5) and (1) by its withdrawal of

recognition on or about June 2, 1980, and that the strike was then converted into an unfair labor practice strike.[9]

Conclusions Of Law

1. Respondent Company is an employer engaged in commerce as alleged.

2. Charging Party Local 807 is a labor organization as alleged.

3. Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition on or about June 2, 1980, from Local 807, as bargaining agent of its employees in the appropriate unit described below. The appropriate unit is:

> All employees working on armored trucks and those who are employed in its meter collection operation at Respondent's facilities located in the New York Metropolitan area, including Westchester, Nassau, Suffolk, Orange, Putnam, and Rockland Counties in New York, and Essex, Bergen, Hudson, Passaic, Union and Morris Counties in New Jersey, but excluding all other employees, and supervisors as defined in the Act.

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[9] Counsel for Respondent, in contending that the Employer properly withdrew recognition, cites various cases which are inapposite here. Thus, for example, in *Mack Mfg. Corp.*, 107 NLRB 109 (1953), the Board revoked the certification previously issued and, consequently, dismissed the unfair labor practice complaint. Likewise, in *Supreme Sugar Co.*, 258 NLRB No. 39 (1981), the Administrative Law Judge, whose decision was adopted without comment by the Board, pertinently noted: "* * * I cannot find that a unit which includes watchmen is appropriate * * *. I shall therefore recommend that the complaint be dismissed * * *." And, *Drivers, Chauffeurs, Warehousemen, etc.* v. *N.L.R.B.*, 553 F.2d 1368 (C.A.D.C. 1977), involves the interplay of the proscriptions of Section 8(b)(7) against certain picketing and a nonqualified union. The Court pertinently noted: "To tolerate continued picketing after dismissal of the Union's petition would bestow on petitioner greater rights than are afforded qualifying unions * * *."

4. The strike herein, which commenced on or about April 14, 1980, was converted into an unfair labor practice strike on or about June 2, 1980, because it was prolonged by Respondent's unfair labor practices.

5. The unfair labor practices found above affect commerce as alleged.

Remedy

Having found that Respondent violated Section 8(a)(5) and (1) of the Act, Respondent will be directed to cease and desist from engaging in such conduct, or like or related conduct, and to post the attached notice. Respondent will also be directed to, upon request, bargain with Local 807 as the exclusive bargaining representative of the employees in the unit found appropriate and, if an agreement is reached, to embody such agreement in a signed contract. Further, having found that the strike herein was converted into an unfair labor practice strike on or about June 2, 1980, and the strike apparently continues, Respondent will be directed, upon application, to offer to striking employees reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, as follows:

1. Striking employees whose jobs were not filled by permanent replacements before June 2, 1980, are, upon application, to be offered immediate reinstatement, dismissing persons hired on or after that date, if necessary, to make room for them.

2. Any striker whose job was filled by a permanent replacement prior to June 2, 1980, is, upon application, to be offered reinstatement upon departure of that replacement.

Further in the event the Respondent does not reinstate the striking employees in the manner set forth above within 5 days from the date reinstatement is required, backpay shall commence running from the date on which

the 5 days expires, in the manner as prescribed in *F.W. Woolworth, Company*, 90 NLRB 289 (1950), with interest to be computed as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977).[10]

The number of striking employees and the situation with regard to replacements were not litigated at the hearing. These matters, together with anything else required to determine to whom offers of reinstatement must be made and what backpay, if any, is due, may, if necessary, be litigated in a backpay proceeding.

ORDER [11]

Respondent Wells Fargo Armored Service Corporation, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain with Truck Drivers Local Union No. 807, International Brotherhood Of Teamsters, Chauffeurs, Warehousemen And Helpers Of America, as the exclusive bargaining agent of the following appropriate unit of employees:

> All employees working on armored trucks and those who are employed in its meter collection operation at Respondent's facilities located in the New York City Metropolitan area, including Westchester, Nassau, Suffolk, Orange, Putnam, and Rockland Counties in New York, and Essex, Bergen, Hudson, Passaic, Union and Morris Counties in New Jersey, but

---

[10] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[11] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

excluding all other employees, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action to effectuate the purposes of the Act:

(a) Bargain collectively with Truck Drivers Local Union No. 807, International Brotherhood Of Teamsters, Chauffeurs, Warehousemen And Helpers Of America, as the exclusive representative of its employees in the appropriate unit in respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement;

(b) Upon application reinstate the unfair labor practice strikers and make them whole for any loss of earnings that they may have incurred in the manner set forth in this Decision;

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order;

(d) Post at its facilities in New York and New Jersey, copies of the attached notice marked "Appendix." [12] Copies of the notice, on forms provided by the Regional

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[12] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Director for Region 2, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material;

(e) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. March 3, 1982

/s/ Frank H. Itkin
FRANK H. ITKIN
Administrative Law Judge

APPENDIX E

LABOR MANAGEMENT RELATIONS ACT, 1947, as AMENDED, 29 U.S.C. § 151 *et seq.*

RIGHTS OF EMPOYEES
(29 U.S.C. § 157)

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .

UNFAIR LABOR PRACTICES
(29 U.S.C. § 158)

Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

REPRESENTATIVES AND ELECTIONS
(29 U.S.C. § 159)

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: . . . .

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be

the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; * * * or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) (1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or
>
> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representa-

tion affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * *

Section 9(f), (g) and (h)
61 Stat 145-146, as amended, 65 Stat 602
[Repealed by Public Law 88-257, § 201(d) (1959)]

(f) (Repealed) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

(g) (Repealed) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information

required to be supplied in the initial filing by subsection (f)(A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f)(B). No labor organization shall be eligible for certification under this section as the representative of any employees, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

(h) (Repealed) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

84-1996

Supreme Court, U.S.
FILED
AUG 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-4083

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TRUCK DRIVERS LOCAL UNION NO. 807, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and FRED M. CAPUTO, an Individual,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
and
WELLS FARGO ARMORED SERVICE CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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BRIEF FOR WELLS FARGO ARMORED SERVICE CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board properly determined that Section 9(b)(3) of the Labor Management Relations Act, 29 U.S.C. § 159(b)(3), privileged the Respondent, Wells Fargo Armored Service Corporation, to withdraw recognition upon the expiration of the collective bargaining agreement from the Petitioner, Truck Drivers Local Union No. 807, International Brotherhood of Teamsters, the collective bargaining representative of Wells Fargo's guards, because Petitioner admitted non-guards to membership.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 84-4083

TRUCK DRIVERS LOCAL UNION NO. 807, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and FRED M. CAPUTO, an Individual,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

and

WELLS FARGO ARMORED SERVICE CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR WELLS FARGO ARMORED SERVICE CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 755 F.2d 5. The decision and order of the National Labor Relations Board and the decision of the administrative law judge are reported at 270 NLRB No. 106.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on February 5, 1985. On March 26, 1985, the Court of Appeals entered an order denying Petitioners' petition for rehearing and its suggestion for a rehearing in banc. The petition for a writ of certiorari was filed on June 24, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Section 9(b)(3) of the Labor Management Relations Act, 1947, as amended ("Act"), 29 U.S.C. § 159(b)(3). This provision, and other relevant statutory provisions, are reprinted in Petitioners' Appendix at pp. 77a-81a.

STATEMENT OF THE CASE

A. Statement of Facts

Wells Fargo Armored Service Corporation ("Wells Fargo" or "Company") an armored car service, transports and delivers money, securities and other valuables for its customers, primarily banks and other commercial institutions. The Company operates two facilities in the New York City area and employs approximately

93 persons as guards. (Pet. A. 3a, 48a.)[1/]

For over thirty years Wells Fargo's guards in its two New York City facilities were represented by Armored Car Chauffeurs and Guards Union Local 820, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 820"). Local 820's membership and leadership consisted exclusively of guards employed in the armored car industry. The last collective bargaining agreement between Local 820 and Wells Fargo was effective through March 16, 1980. (Pet. A. 3a, 49a.)

In June, 1979, Wells Fargo received notification that the General Executive Board of the International Brotherhood of

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1/ "Pet. A." refers to the Appendices filed by the Petitioners.

Teamsters had directed that Local 820 merge with Truck Drivers Local 807, International Brotherhood of Teamsters, Chauffeurs, and Warehousemen and Helpers of America ("Local 807"), a much larger local that represents non-guard employees. Wells Fargo subsequently recognized Local 807 pursuant to a successorship clause in the bargaining agreement with Local 820, and Local 807 began administering its predecessor's collective bargaining contract. (Pet. A. 3a, 49a.)

Early in 1980, Local 807 notified Wells Fargo that it desired to open negotiations for a collective bargaining agreement to replace the existing one which was due to expire in March. (Pet. A. 4a, 49a-50a). Between February and mid-April, Wells Fargo officials met with Local 807 representatives on eleven

occasions and twice agreed to extend the contract after it had expired in March. (Pet. A. 4a, 49a-50a).

During these negotiations, the Company sought economic and security-related concessions which it believed were essential. Although the parties were able to reach agreement on some matters, Local 807 rejected the proposed concessions which Wells Fargo considered critical. (Pet. A. 4a, 50a.)

While negotiations were in progress in early April, a crew of Wells Fargo guards refused to cross a Local 807 picket line at a Wells Fargo customer with a delivery worth several millions of dollars. For a period of time, the armored vehicle remained with its cargo stranded on the street. Subsequently, the valuable cargo was returned to the Wells Fargo terminal. (Pet. A. 57a-58a.)

By mid-April, Wells Fargo and Local 807 were still unable to resolve a number of substantial economic and non-economic issues. During a bargaining session on April 11, Wells Fargo submitted a "final offer" to Local 807. On April 13, the Local 807 membership rejected Wells Fargo's proposal, and the union commenced an economic strike against Wells Fargo on the following day. (Pet. A. 4a, 50a.)

During the strike, the parties met on three occasions but were unable to resolve their differences. On June 2, 1980, Wells Fargo withdrew recognition from Local 807 as the bargaining representative of the Company's guards. (Pet. A. 4a, 50a.)

B. Proceedings Below

2. Local 807 and Fred Caputo, a Wells Fargo employee, filed separate

unfair labor practice charges alleging that Wells Fargo had unlawfully withdrawn recognition from Local 807. The cases were consolidated and a complaint issued in October, 1980, alleging that Wells Fargo had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by withdrawing recognition from Local 807. After an evidentiary hearing, the administrative law judge issued his decision and found that the Company was estopped from withdrawing recognition from Local 807. (A. 4a,47a.)

In a 3-1 decision, a majority of the Board (Member Zimmerman dissenting) reversed the administrative law judge and held that Wells Fargo was privileged to withdraw recognition from Local 807. Accordingly, the Board dismissed the complaint.

In finding that Wells Fargo's action was lawful, the Board noted that the purpose of Section 9(b)(3) of the Act was "to shield employers of guards from the potential conflict of loyalties arising from the guard union's representation of non-guard employees or its affiliation with other unions who represent non-guard employees." (Pet. A. 32a.)

The Board rejected Local 807's argument that Section 9(b)(3) only precludes the certification of a mixed union.[2/] The Board observed that its prior decisions have interpreted Section 9(b)(3) broadly in order to effectuate the policies of the Act. Moreover, the Board noted that a potential conflict of loyalties exists

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2/ "Mixed union" refers to a union that represents both guard and non-guard employees.

regardless of whether the bargaining relationship is initially created through certification or is compelled to continue by virtue of a bargaining order.

The Board also rejected Petitioners' additional argument that Wells Fargo should be estopped from withdrawing recognition because the Company had voluntarily recognized Local 807. The Board held that Wells Fargo was not estopped from withdrawing recognition because an estoppel theory cannot operate to preclude the intended beneficiary of a statutory provision from asserting rights under it. Here, the Board noted that the intended beneficiaries of Section 9(b)(3) were employers of guards, such as Wells Fargo. (Pet. A. 35a-36a.)

3. In a 2-1 decision, the Second Circuit (Judge Mansfield dissenting)

upheld the Board's order. The Court noted that Section 9(b)(3) was enacted to avoid potential conflicts of loyalties and has been broadly construed to give effect to that purpose. (Pet. A. 6a-8a.)

The Court further noted that the potential for divided loyalties exists both at the initial stage when an employer voluntarily recognizes a mixed union as well as at a later time. Accordingly, the Second Circuit held that "[e]mployers may choose at the outset not to rely on the strictures that Congress enacted for their benefit, but the policy concerns inherent in the statute require that employers have the right to rely on it at some later point." (Pet. A. 11a.)

The Court rejected Petitioners' contention that Section 9(b)(3) should be narrowly construed to prohibit only the

certification of mixed unions in order to avoid undermining the stability of existing bargaining relationships. The Court found that "Congress knowingly decreased the stability of bargaining relationships in order to further its objective of protecting employers from the potential of divided loyalties." (Pet. A. 11.)

In rejecting Petitioners' estoppel argument, the Court, agreeing with the Board, held that the application of an estoppel theory in this case is inappropriate because "recogniz[ing] an estoppel would result in a situation inconsistent with the purpose of the statute." (Pet. A. 11a-12a.)

Finally, the Court rejected Petitioners' claim that the Board's interpretation of Section 9(b)(3) violates both the union's and its members' First

Amendment right to freedom of association. The Court found that the public interest served by the Board's interpretation outweighs "the minimal infringement" on First Amendment rights. Accordingly, the court held that Section 9(b)(3) as applied by the Board was constitutional. (Pet. A. 12a.)

ARGUMENT

1. This case presents a narrow question of statutory construction for review, namely whether the Board reasonably interpreted Section 9(b)(3) so as to permit an employer of guards to withdraw recognition from a "mixed" union that represents both guards and non-guards at the expiration of a contract. This is precisely the type of issue which Congress delegated to the Board. As the Supreme Court recently noted

in Pattern Makers' League of North America, AFL-CIO, et al. v. NLRB, et al., _____ U.S. ___, 53 U.S.L.W. 4928, 4933 (U.S., June 27, 1985), "[t]he Board has the primary responsibility for applying the general provisions of the Act to the complexities of industrial life." Accordingly, it is the Board, in the first instance, which must strike a balance between the competing interests of labor and management to effectuate a national labor policy. NLRB v. Truck Drivers, 353 U.S. 87, 96 (1957); NLRB v. Insurance Agents, 361 U.S. 477, 499 (1960). In reconciling these competing claims, the Board's interpretation of the statutory provisions of the Act is entitled to considerable deference. Pattern Makers' League of North America, AFL-CIO, et al. v. NLRB, 53 U.S.L.W. at 4929, NLRB v. City Disposal

Systems, Inc., 465 U.S. ____, 115 Labor Rel. Rep. (BNA) 3193, 3197 (1984); NLRB v. Iron Workers, 434 U.S. 335, 350 (1977). Consequently, if the Board's construction of the statute is reasonable, its decision should be affirmed even if a reviewing court might prefer a different statutory interpretation. Ford Motor Co. v. NLRB, 441 U.S. 488, 497 (1979).

2. Contrary to Petitioners' claim (Pet. Br. 8-9), guard employees will not be deprived of union representation as a consequence of the Board and court decisions in this case. As the Second Circuit noted (Pet. A. 10a, 12a), guards may join any union they wish; however, in order to obtain the benefits that derive from representation by a certifiable union, guards must join a union that represents guards exclusively.

As discussed more fully infra pp. 14-17, in enacting Section 9(b)(3), Congress sought to strike a balance between, on the one hand, the interest of guard employees in selecting their collective bargaining representative and, on the other hand, the interest of the guards' employers in avoiding a situation in which the potential for divided loyalties would arise. Since such a situation would occur where a union represents both guards and non-guards, Congress struck a balance by precluding the Board from compelling -- directly or indirectly -- an employer to recognize a mixed union. As the Sixth Circuit noted in NLRB v. White Superior Div., White Motor Corp., 404 F.2d 1100, 1103 (1968):

> [W]e think it is clear that § 9(b)(3) does not operate to prevent guard employees from joining a labor organization, and this principle extends

> to labor organizations which also represent non-guard employees. Indeed, the real significance of § 9(b)(3) is the restrictions which it imposes on the Board.

Accord, NLRB v. Bel Air-Mart, Inc., 497 F.2d 322, 326-327 (4th Cir. 1974).

Although, as the Second Circuit noted (Pet. A. 10a), the proscription against mixed unions "means that there is little sense in an employee remaining a member of such unions," guards nevertheless have ample opportunity for representation by unions that represent guard employees exclusively. Indeed, shortly after the court issued its decision in the instant case, two unions which represent guards began organizing campaigns at Wells Fargo's New York facilities and filed representation petitions requesting an election. It is evident from these events that guard employees not only have the

opportunity to be represented, but that guard unions are actively competing to represent guard employees.3/

3. Contrary to Petitioners' claim (Pet. Br. 10-16), the decisions below are consistent with the statutory language and legislative history of Section 9(b)(3). It is undisputed that Section 9(b)(3) was enacted in response to the Supreme Court's decisions in NLRB v Jones & Laughlin Steel Corp. 331 U.S. 416 (1947) and NLRB v E.C. Atkins & Co., 331 U.S.398 (1947), which required an employer of guards to bargain with a union that represented both guard and non-guard employees. Although the

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3/ A bill amending Section 9(b)(3) is presently before Congress. The bill would significantly limit the statutory definition of "guard," excluding, inter alia, armored car security personnel. The International Brotherhood of Teamsters is strongly supporting the passage of the proposed amendment.

House-Senate Conference Committee agreed that guards would retain their status as "employees" under the Act,[4/] the Committee was impressed with the Sixth Circuit's position in Jones & Laughlin (154 F.2d 932 (1948)). The Sixth Circuit had denied enforcement of the Board's order which had required the employer to bargain with a mixed union that represented both the employer's guard and production employees. 53 NLRB 1046 (1947). In holding that it was inappropriate for the Board to certify

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4/ The House of Representatives initially passed a bill that would have effectively classified guards as "supervisors" and thereby denied guards the protection and rights afforded "employees" under the Act. H.R. 3020, 80th Cong., 1st Sess. 2(12)(B) (April 18, 1947). The Senate, however, defeated the House proposal to categorize guards as supervisors, and thereby preserved the "employee" status of guards. H.R. 3020, as amended, 80th Cong., 1st Sess. 2(a) (May 13, 1947).

such a mixed union, the Sixth Circuit reasoned that the guards

> have a private obligation to their employer . . . . In case of industrial unrest and strikes on the part of the production employees, the obligations of the plant guards . . . would be incompatible with their obligations to the Union which, since it represents production employees, authorizes and directs the strike.

154 F.2d at 935.

In the instant case, both the Board and Second Circuit properly concluded that in order to effectuate the statutory purpose for which Section 9(b)(3) was enacted, the Board cannot compel an employer to bargain with a mixed union that represents a unit of guards, regardless of the parties' prior bargaining history. As the Board observed (Pet. App. 32a):

> "Congress' purpose in enacting Section 9(b)(3) was to shield employers from the potential conflict of loyalties arising from the guard union's representation of non-guard employees or its affiliation with other unions

> who represent non-guard employees. However, this potential conflict of loyalties exists whether a mixed guard union is certified or not. Viewed in this light, there is no basis for the Board's drawing a distinction between initial certification and, as here, the compulsory maintenance of a bargaining relationship through the use of a bargaining order."

Thus, both the Board and court recognized the Congressional mandate that no employer of guards shall be forced to recognize and bargain with a mixed union, for to do so places the employer in the very situation from which Congress intended to insulate it.

Indeed, as the Second Circuit noted (Pet. A. 11a), the potential for a conflict of loyalties was clearly present in this case. Here, the merger of Local 820 into Local 807 resulted in Wells Fargo's guards becoming members of a large general trucking local that represented predomi-

nantly non-guard employees. Since Local 807 represented employees of one of Wells Fargo's customers and other potential customers, there was the potential that Wells Fargo guards would confront a Local 807 picket line in the course of their work. As described supra p. 5, this potential materialized and Wells Fargo guards were faced with a conflict between their loyalty to Local 807 and their loyalty to their employer. The guards resolved this conflict in favor of their union and refused to cross the picket line while their cargo, worth millions of dollars, was left stranded on the street.

Contrary to Petitioners' claim (Pet. Br. 12), the fact that the language of Section 9(b)(3) only expressly mentions certification does not undermine the Board's analysis that it is precluded from

compelling an employer to bargain with a mixed union after the expiration of a collective bargaining agreement. Thus, it is well settled that a statute must be analyzed and applied in light of that provision's legislative history. As the Supreme Court has stated, "circumstances of the enactment [of a statute] may persuade a court that Congress did not intend words of common meaning to have their literal effect." Watt v. Alaska, 451 U.S. 259, 266 (1981). Accord: NLRB v. Lion Oil Co., 352 U.S. 282, 288 (1957); Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 285 (1956). Moreover, where it is evident that Congress failed to consider the application of a statutory provision to a particular set of circumstances, the Board has the responsibility to apply the statute to those circumstances in a manner

consistent with the provision's purpose. NLRB v. Yeshiva University, 444 U.S. 672, 679-681 (1979).

Here, Congress passed Section 9(b)(3) in order to eliminate situations in which employers would be compelled to bargain where the potential for divided loyalties exists. However, as both the court and Board noted, the case that presented the issue at the time Section 9(b)(3) was drafted was Jones and Laughlin, a case in which the Board had issued its bargaining order pursuant to Board certification of the mixed guard/non-guard union. As the House-Senate conferees were primarily concerned with precluding a repetition of that situation, they adopted language that accomplished this result -- they prohibited the Board from certifying a mixed union as the representative of guard

employees. Congress did not consider the situation where an employer voluntarily recognized an uncertified mixed union.

Moreover, there is absolutely no indication in the legislative history of this provision that Congress intended to distinguish between bargaining orders issued as a result of initial certification and bargaining orders issued in other contexts. As the Board and court explained in the instant case (Pet. A. 11a, 32a), the conflict of loyalties identified in Jones & Laughlin and considered so significant by Congress exists irrespective of whether the mixed guard/nonguard union is certified. Based on the legislative purpose underlying Section 9(b)(3), the Board was clearly warranted in interpreting the statutory provision as proscribing the Board from compelling an

employer to bargain with a voluntarily recognized mixed union where the employer seeks to terminate the bargaining relationship at the expiration of a collective bargaining agreement.

Indeed, the Board, with court approval, has not confined itself to the literal wording of Section 9(b)(3) in applying that provision to other situations. Thus, for example, in Armored Motor Service Co., 106 NLRB 1139 (1953), the Board held for the first time that armored car guards were "guards" within the meaning of Section 9(b)(3). Although this conclusion is not required by the plain language of Section 9(b)(3),[5/] it is compelled by the

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5/ Section 9(b)(3) defines "guard" as "any individual employed . . . to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the

FOOTNOTE CONTINUED

policy underlying the section. As the Board stated in that case:

> The danger of divided loyalty which Congress sought to eliminate may not be quite so far-reaching in the case of armored-car guards [as opposed to plant guards], but it is, nevertheless, present. A conflict of loyalty could arise, for example, if the guards should be called upon to deliver money or valuables to one of their customers whose employees were represented by the same union as represented the armored-car guards and the employees of the customer were on strike and picketing the premises of the customer.

106 NLRB at 1140.

The Board also relied on the congressional intent underlying Section 9(b)(3) in Brink's, Inc., 226 NLRB 1182 (1976). There, the Board held that "couriers" were "guards," because they were subject to the

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5/ FOOTNOTE CONTINUED

employer's premises." (emphasis added). Armored car guards protect primarily property belonging to their employer's customers, not to their employer.

potential conflict of loyalties Congress addressed in Section 9(b)(3). See also, Supreme Sugar Co., 258 NLRB 243 (1981). (Board finds watchmen are guards where these individuals are "the employer's sole guardians against loss or damage to property.")6/

In sum, the Board and the courts have not been constrained by the language of Section 9(b)(3) in fashioning "guard law"

6/ Courts have recognized the propriety of the Board's expanded coverage of Section 9(b)(3) in order to effectuate the purposes of the Act. For example, the Second Circuit recently approved the Board's policy of considering couriers as "guards." See Teamsters' Local 851 v. NLRB, 732 F.2d 43, 44 (2d Cir. 1984). And other courts have found the Board's inclusion of armored car security personnel as guards within the meaning of Section 9(b)(3) to be appropriate. See International Brotherhood of Teamsters, etc. v. NLRB, 568 F.2d 12, 15-16 (7th Cir. 1978); Drivers, Chauffeurs, Warehousemen and Helpers, Local 71 v. NLRB, 553 F.2d 1368, 1372, 1378 (D.C. Cir. 1977).

over the last 30 years. To the contrary, their primary purpose has been to effectuate the intent of Congress. They have recognized that there are situations in which the potential conflict of loyalties might arise, not all of which could have been anticipated by Congress, and their decisions have construed Section 9(b)(3) accordingly.7/

7/ Petitioners argue (Pet. Br. 13-16) that the legislative history of Section 8(a)(5) demonstrates that the Board "attributed far too much to certification" in the context of Section 9(b) (3). Petitioner relies on the fact that Congress expressly rejected a proposed amendment to Section 8(a)(5) which would, in effect, have made an employer's obligation to bargain contingent on a union's certification. However, the legislative history of Section 8(a)(5) demonstrates that Congress expressly considered employers' bargaining obligations arising from voluntary recognition and Board certification respectively. By contrast, as noted above, Congress did not consider the implications of voluntary recognition in the context of Section 9(b)(3). More importantly,

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however, the interests protected by Sections 9(b)(3) and 8(a)(5) are different. While Congress' refusal to amend Section 8(a)(5) had the effect of maintaining the stability of bargaining relationships and protecting employees' rights, the inclusion of Section 9(b)(3) was intended to limit the rights of guard employees as a means of protecting the interest of guard employers. See discussion supra at pp. 14-17.

Petitioners rely (Pet.Br.14-15) on United Mine Workers v. Arkansas Oak Flooring Company, 351 U.S. 62 (1956), to support their contention that the Board and Second Circuit have erroneously made a union's status as collective bargaining representative contingent on Board certification. Petitioners' reliance on this case is misplaced. Arkansas Oak dealt with the ramifications of a union's failure to comply with Sections 9(f), (g) and (h) of the Act, subsequently repealed, which denied unions access to the Board's processes if they failed to comply with certain filing requirements. In that case the Supreme Court held that a state court could not enjoin a union from engaging in recognitional picketing despite the fact that the union could not be certified because it had not complied with Sections 9(f), (g) and (h). The Court notes that

FOOTNOTE CONTINUED

4. Petitioners argue (Pet. Br. 17-18) that the Board's and Court's interpretation of Section 9(b)(3) is erroneous because it undermines the stability of existing bargaining relationships. While it may be true that Section 9(b)(3) does not foster stability in bargaining

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7/ FOOTNOTE CONTINUED

although the union was not certifiable and could not resort to the Board for a bargaining order, employees were free to select the union as their representative and use self-help -- strikes and picketing -- to induce the employer to voluntarily recognize the union. Id. at 74-75. Arkansas Oak does not hold that the Board is compelled to issue a bargaining order where it cannot certify a union or where recognition was intended to be entirely voluntary. Moreover, Section 9(b)(3) serves an entirely different purpose than Sections 9(f), (g) and (h) did. Section 9(b)(3) was intended to limit the guards' right to representation by any union of their choice as a means of insulating guards' employers from Board compulsion to recognize a mixed union. Sections 9(f), (g) and (h), on the other hand, were intended merely to encourage unions to comply with filing requirements.

relationships between mixed unions and employers, this factor does not demonstrate that the construction of Section 9(b)(3) by the Board and Second Circuit is erroneous. It is undisputed that Congress amended the Act in order to shield employers of guards from the potential of divided loyalties in the event of labor strife. Although employers were permitted to recognize such unions voluntarily, there is no evidence that Congress was concerned with protecting the stability of these bargaining relationships between mixed unions and employers. Indeed, as the Second Court noted (Pet. A. 9a-10a), Congress' express preclusion of the Board from giving its imprimatur to these relationships is evidence that these relationships were disfavored.

Moreover, compelling employers to maintain bargaining relationships with mixed unions would clearly jeopardize the employers' interest that Congress sought to protect. Thus, for example, in a situation where an employer of guards voluntarily recognizes a non-certifiable mixed union, the nature of the bargaining relationship will likely change over time -- new union leadership unsympathetic with the security concerns of a guard employer may be elected or there may be a merger with a "stranger" union -- and as a consequence the risk of a conflict of loyalties may surface or increase. It would certainly not effectuate the underlying purpose of Section 9(b)(3) to prohibit an

employer from extricating himself from such a relationship.8/

5. Contrary to the Petitioners' contention (Pet. Br. 12), the Board's decision in this case does not represent a departure from prior case law in which the Board has protected the statutory rights of guard employees. The Board and courts have consistently held -- and will no doubt continue to do so -- that guards' participation in union activities is protected conduct. Accordingly, an employer violates the Act by acting in a discriminatory or retaliatory manner against guard

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8/ In other contexts the stability of bargaining relationships has been sacrificed to further the Act's objectives. Thus, for example, an employer who recognizes a supervisors' union may withdraw recognition from the union because Congress intended such recognition to be entirely voluntary. Teamsters Local No. 372 v. NLRB, 735 F.2d 969 (6th Cir. 1984), cert. denied, 84 L. Ed. 815 (1985).

employees because they engage in protected activities. See e.g. NLRB v. Bel-Air Mart, Inc., supra (employer violated the Act by discharging a guard for attending a meeting of a mixed union); NLRB v. White-Superior Div., White Motor Corp., supra (employer violated the Act by announcing that it was contracting out guard work and would transfer guards to production and maintenance units in response to a mixed union's request to bargain.) Thus, the decision in the instant case does not diminish the statutory rights of guard employees that the Board has previously protected.

However, the Board has also consistently held that it is prohibited from issuing a bargaining order in favor of a mixed union that is ineligible for certification as the bargaining representative

of a unit of guards. Thus, in City National Bank & Trust Co. of Chicago, 76 NLRB 213, 214 (1948), the Board applied this principle for the first time, observing

> [t]he unit which the Union seeks to represent comprises guards. The union is an affiliate of an organization which admits employees other than guards into membership. Accordingly, in view of the [1947] amendments to the Act and the Union's affiliation, we do not believe that an order should be made in this case requiring the respondents to bargain . . .

Accord, Mack Manufacturing Corp., 107 NLRB 209 (1953) (Board held that employer lawfully refused to bargain with mixed guard/non-guard union that was improperly certified); see also International Harvester Co., 145 NLRB 1747 (1964) (Board permitted employer's petition to decertify union that had been certified as bargaining representative of guard unit because union

subsequently became affiliated with a non-guard union).

Moreover, the Board has represented to federal courts, and courts have found, that the Board cannot issue a bargaining order in favor of a union ineligible for certification under Section 9(b)(3) of the Act. Thus, in Rock-Hill-Uris, Inc. v. McLeod, 236 F. Supp. 395 (S.D.N.Y. 1964), affd, 344 F.2d 697 (2d Cir. 1965), the court approved the Board's former discretionary policy of placing non-certifiable unions on election ballots and certifying only arithmetic results if the ineligible union won the election.9/ In approving this practice, however, the court relied

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9/ In The University of Chicago, 272 NLRB No. 126 (1984), the Board reversed its policy of allowing non-certifiable unions to be included on the ballot in a representation election.

on the Board's representation that it did not and would not "[process] representation petitions or refusal-to-bargain complaints from labor organizations disqualified from certification." 236 F. Supp. at 397 (footnote omitted) (emphasis added).

6. Relying on the Third Circuit decision in International Telegraph and Telephone Corp. (ITT) v. NLRB, 382 F.2d 366 (1967), cert. denied, 389 U.S. 1039 (1968), Petitioners argue (Pet. Br. 19-20) that Wells Fargo should be estopped from terminating its relationship with Local 807 because the company had voluntarily recognized the union. Petitioners' reliance on this case is misplaced. In ITT the employer was estopped from withdrawing recognition from a union despite the fact that the bargaining unit was a non-certifiable mixed unit of professional and non-professional

employees. However, ITT is easily distinguishable from the instant case. As the Board explained in its decision below (Pet. A. 34a-35a), the employer in ITT could not justify withdrawing recognition by relying on a statutory provision -- in that case Section 9(b)(1) of the Act, 29 U.S.C. 159(b)(1)[10/] -- for which it was not the intended beneficiary. The Board contrasted ITT with Utah Power Co., 258 NLRB 1059 (1981), a case in which the Board held that professional employees, as intended beneficiaries of Section 9(b)(1), were not precluded from asserting their statutory right under Section 9(b)(1) to

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10/ Section 9(b)(1), 29 U.S.C. 159(b)(1), provides that the Board is prohibited from certifying a union composed of professional and non-professional employees unless the professional employees have voted to be included in a "mixed" unit.

have a self-determination election even though they had not objected to their inclusion in a mixed professional/non-professional unit for 43 years.[11] Relying on Utah Power, the Board in this case properly determined that "[Wells Fargo] was not estopped from withdrawing recognition because the estoppel theory . . . does not operate to preclude the intended beneficiary of the statute from asserting rights thereunder" (Pet. A. 35a - 36a).[12]

11/ Two members of the Board also distinguished the instant case from ITT on the additional grounds that, unlike the situation in ITT , Wells Fargo's relationship with Local 807 was short-lived and its withdrawal of recognition occurred in a context free of unfair labor practices. (Pet. A. 35a).

12/ Petitioners also rely (Pet. Br. 19-20) on NLRB v. Cardox Div. of Chemtron Corp., 699 F.2d 148 (3d Cir. 1983) to support their estoppel argument. In

FOOTNOTE CONTINUED

12/ FOOTNOTE CONTINUED

Cardox the employer withdrew recognition from a union that it had voluntarily recognized on the ground, inter alia, that the unit was inappropriate. The Board found that the employer was estopped from withdrawing recognition and, consequently, that its conduct was violative of Section 8(a)(5) and (1) of the Act. The Court remanded the case to the Board on unrelated grounds, noting that "in a voluntary recognition case, Section 9(b) requires only that the Board make a determination that the unit agreed upon by the parties is not inconsistent with the National Labor Relations Act and past Board policy." 699 F.2d at 156.

Petitioners' reliance on the dicta in Cardox quoted above is misplaced. As the quoted portion of the Third Circuit's decision makes clear, the court was not discussing Section 9(b)(3). That provision of the Act represents a limitation on Section 9(b). Moreover, the two provisions, Sections 9(b) and 9(b)(3), serve entirely different purposes. While Section 9(b) requires that the Board determine that a proposed bargaining unit is appropriate in order to protect employees (see 699 F.2d at 166), Section 9(b)(3) was intended to insulate employers from the possibility of divided loyalties. In sum, Cardox is inapposite.

CONCLUSION

For the foregoing reasons, we respectfully submit that Petitioners' Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 84-1996

In the Supreme Court of the United States

OCTOBER TERM, 1985

TRUCK DRIVERS LOCAL 807, ETC., ET AL., PETITIONERS
v.
NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board reasonably determined that, under Section 9(b)(3) of the National Labor Relations Act, the respondent company could not be compelled, upon expiration of its collective bargaining agreement, to continue to recognize and bargain with the union representing its guard employees when the union also admits non-guards to membership.

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NATIONAL LABOR RELATIONS BOARD AND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-23a) is reported at 755 F.2d 5. The decision and order of the National Labor Relations Board (Pet. App. 25a-46a), including the decision of the administrative law judge (Pet. App. 47a-76a), are reported at 270 N.L.R.B. 787.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1985. A petition for rehearing was denied on March 26, 1985 (Pet. App. 24a). The petition for a writ of certiorari was filed on June 24, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. 77a-81a.

STATEMENT

1. Respondent Wells Fargo (the Company)[1] operates an armored car service that transports money, securities, and other valuables for banks and other commercial customers (Pet. App. 48a). In 1948, the Company entered into a collective bargaining relationship with Local 820, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America covering guards in the New York City area. The parties thereafter executed a series of collective bargaining agreements, the last of which was effective from March 1977 until March 1980 (*id.* at 49a).

In June 1979, Local 820, which had been composed exclusively of guards employed in the armored car industry, was merged into petitioner Teamsters Local 807, a larger local that admitted both guards and nonguard employees to membership (a "mixed guard" union). The Company voluntarily recognized Local 807 pursuant to a successorship clause in Local 820's bargaining agreement, and the parties' relations were governed by that agreement until its expiration. Pet. App. 49a. Following expiration of the agreement, and after the parties had failed to reach agreement on a new contract, the Company notified the union on June 2, 1980, that it was "withdrawing the voluntary recognition accorded Local 807 IBT as collective bargaining representative of [its] armored guard employees" (*id.* at 50a). The union and one of its members subsequently filed unfair labor practice charges with the National Labor Relations Board alleging that the Company violated Section

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[1]The Company intervened in the court of appeals and accordingly is a respondent in this Court.

8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by withdrawing recognition and refusing to bargain, and the Board's General Counsel issued a complaint.

2. The Board, rejecting the conclusion of the administrative law judge (ALJ), held that the Company did not violate Section 8(a)(5) and (1) by withdrawing recognition from petitioner, and accordingly it dismissed the complaint (Pet. App. 25a-46a). Because, under Section 9(b)(3) of the Act, 29 U.S.C. 159(b)(3), a "mixed guard" union is not entitled to certification by the Board and therefore the Company could not have been compelled to recognize it as an initial matter, the Board ruled that the Company did not commit an unfair labor practice by withdrawing its prior voluntary recognition.[2] The Board rejected the ALJ's reasoning that Section 9(b)(3) expressly precludes only Board certification of mixed guard unions, but does not otherwise abrogate an employer's general statutory obligation to continue to recognize and bargain with a union that it has voluntarily recognized. The Board explained (Pet. App. 32a (footnote omitted)):

> It is clear that * * * Congress' purpose in enacting Section 9(b)(3) was to shield employers of guards from the potential conflict of loyalties arising from the guard union's representation of nonguard employees or its

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[2]Section 9(b)(3) prohibits the Board from certifying a union to represent a unit of guard employees if the union also admits nonguards to membership, or is affiliated directly or indirectly with an organization that admits nonguards to membership. Local 820 was certified by the Board in 1948 because at that time the Board held that armored car personnel were not "guards" within the meaning of Section 9(b)(3). *Brink's, Inc.*, 77 N.L.R.B. 1182 (1948). In 1953, the Board reversed that ruling. *Armored Motor Service Co., Inc.*, 106 N.L.R.B. 1139. Thus, since 1953, both Local 820, a union of guards affiliated with the Teamsters, and Local 807, a Teamsters local that itself admits guard and nonguard members, have been "mixed guard" unions ineligible for Board certification under Section 9(b)(3).

> affiliation with other unions who represent nonguard employees. However, this potential conflict of loyalties exists whether a mixed guard union is certified or not. Viewed in this light, there is no basis for the Board's drawing a distinction between initial certification and, as here, the compulsory maintenance of a bargaining relationship through the use of a bargaining order. In either case, saddling the employer with an obligation to bargain presents it with the same set of difficulties and the same potential conflict of loyalties that Section 9(b)(3) was designed to avoid.

The Board added that, as the "*intended beneficiary*" of the protection against divided employee loyalty in Section 9(b)(3), an employer does not waive that protection, including the right not to be forced to bargain, by agreeing to recognize a mixed guard union in the first instance (Pet. App. 35a-36a (emphasis in original)).[3] Board Member Zimmerman dissented, finding that the language of Section 9(b)(3), which prohibits only Board certification of mixed guard unions, does not otherwise abrogate an employer's obligation to bargain with a recognized union in the absence of an employer's good faith doubt concerning the union's continued majority support among employees (*id.* at 38a-46a).

3. The court of appeals upheld the Board's decision and enforced the Board's order (Pet. App. 1a-23a). The court

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[3]Because the Board found that Congress in Section 9(b)(3) had been concerned with shielding employers from *potential* conflicts of loyalty among guard employees, the Board considered irrelevant the ALJ's finding that the Company withdrew recognition in this case for economic reasons related to the negotiations for a new contract (Pet. App. 32a-33a n.10). The Board specifically noted, however, that it was not reaching the question whether an employer would be privileged to withdraw recognition from a mixed guard union during the term of a collective bargaining agreement (Pet. App. 27a n.4).

noted at the outset that "Congress precluded certification of [mixed guard] unions because it realized that employers should not be forced to bargain with [such] unions" due to the risk of divided loyalties among employees (Pet. App. 11a). In light of that congressional purpose, the court agreed with the Board that there is "no reasoned basis for a distinction between initial certification and compulsory maintenance of a voluntary relationship" (*ibid.*). Rather, the court found that the policy concerns underlying Section 9(b)(3) suggest that an employer should remain free to withdraw recognition from a mixed guard union after having previously extended it, although that would not be true in the case of a union either certified or eligible for Board certification, which an employer must continue to recognize as long as the union enjoys majority support (*id.* at 9a, 11a).[4] Accordingly, the court concluded, "based on the language and legislative history of Section 9(b)(3), the Board was warranted in interpreting the section as proscribing Board direction to an employer to bargain with a mixed guard union despite prior voluntary recognition of that union by the employer" (*id.* at 10a-11a).

Judge Mansfield dissented (Pet. App. 13a-23a). He explained that, in his view, Congress, by prohibiting only Board certification of mixed guard unions in Section 9(b)(3) and by failing expressly to make certification a prerequisite to employee representation by a mixed guard union or an employer's general statutory duty to bargain, did not intend to permit an employer that voluntarily has recognized a mixed guard union to withdraw recognition at the end of a contract term.

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[4]The court noted, however, that an employer who voluntarily recognizes a mixed guard union generally may not discontinue the relationship during the term of a collective bargaining agreement (Pet. App. 11a, citing *Burns International Detective Agency, Inc.*, 134 N.L.R.B. 451 (1961)).

ARGUMENT

Petitioners contend (Pet. 7-20) that the Act requires an employer who has voluntarily recognized a mixed guard union thereafter to continue recognition absent a good faith doubt or actual evidence of the union's continued majority support. This contention is without merit. The court of appeals correctly concluded that the Board's decision that the employer is free to withdraw recognition is a reasonable construction of Section 9(b)(3) that furthers the congressional policy against the conflict of employee loyalties that could arise from compelled representation by mixed guard unions. That construction by the Board is entitled to substantial deference. See *Pattern Makers' League, AFL-CIO* v. *NLRB,* No. 83-1894 (June 27, 1985), slip. op. 5; *NLRB* v. *City Disposal Systems, Inc.,* No. 82-960 (Mar. 21, 1984), slip op. 6. There is no conflict in the circuits on this issue, and accordingly no reason why this case warrants review by this Court.[5]

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[5]Contrary to petitioner's contention (Pet. 7-10), the issue raised in this case is not foreclosed from further decisions by the Board and subsequent review in the courts of appeals by the fact that the General Counsel will not issue further complaints alleging that an employer's withdrawal of voluntary recognition from a mixed guard union violates Section 8(a)(5) of the Act. A mixed guard union from which voluntary recognition is later withdrawn could picket in support of its asserted right to continued recognition, and urge its status as a voluntarily recognized union as a defense to a charge that the picketing violates Section 8(b)(7) of the Act, 29 U.S.C. 158(b)(7). That Section prohibits under certain circumstances picketing "where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization," but the Board has held that it does not apply to picketing by an incumbent union claiming a legitimate right to *continued* recognition. See *NLRB* v. *Local Construction Trades Council of Santa Barbara County (Sullivan Electric Co.),* 146 N.L.R.B. 1086, 1087 (1964). The fact that the Board's General Counsel would refuse to issue a complaint on the basis of the union's contentions under Section 8(a)(5) would not preclude the union's defense in the Section 8(b)(7) proceedings. See *Hotel & Restaurant Employees Local 274 (Warwick Caterers),* 269 N.L.R.B. 482, 482-483 (1984)).

1. In enacting Section 9(b)(3) as part of the 1947 Taft-Hartley amendments, Congress established a clear exception from the general statutory requirement expressed in Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), that an employer recognize and bargain with the union selected by a majority of employees in an appropriate bargaining unit. In Section 9(b)(3), Congress expressly provided that, notwithstanding the general duty to bargain in Section 8(a)(5) or the desires of employees, the Board is precluded from certifying a mixed union to represent a unit of guards.[6] The legislative history of Section 9(b)(3) makes clear that its purpose was to prevent the potential conflicts of loyalty that may arise when guards are required to enforce rules for the protection of an employer's property against fellow union members.[7] Congress ensured an employer's right to be free

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[6]Congress also provided, in a clause not at issue here, that the Board shall not allow bargaining units composed of both guards and non-guard employees. *§* 9(b)(3), 29 U.S.C. 159(b)(3).

[7]Congress enacted Section 9(b)(3) as a direct reaction to this Court's decisions in *NLRB* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416 (1947), and *NLRB* v. *E.C. Atkins & Co.*, 331 U.S. 398 (1947), in which the Court had reversed lower court decisions refusing to enforce Board orders compelling employers to bargain with plant guards represented by the same union that represented the employers' production and maintenance employees. In refusing to enforce the Board's order in *Jones & Laughlin*, the Sixth Circuit had explained (146 F.2d 718, 722-723 (1944)):

> When these particular [u]nions were selected as bargaining agents for the plant protection employees, these employees might in an effort to discharge their duty to their employer find themselves in conflict with other members of their [u]nion over the enforcement of some rule or regulation they were hired to enforce. * * * We think that the imposition of such strains upon personal allegiance and personal interest would undoubtedly be detrimental to the public interest and to the free flow of commerce.

During consideration of the Conference Report containing the version of Section 9(b)(3) that was finally enacted, Senator Taft stated: "The conferees * * * have been impressed with the reasoning of the

of such conflicts by removing the Board's certification authority in cases of mixed guard unions, thereby also precluding the Board from ordering an employer to recognize such a union under Section 8(a)(5). The effect of the Section 9(b)(3) ban on certification therefore was to establish that an employer has *no* duty initially to recognize and bargain with a mixed guard union under Section 8(a)(5). Whether or not an employer wishes to deal with such a union is a matter of its free choice. See *NLRB* v. *White Superior Division, White Motor Corp.*, 404 F.2d 1100, 1103 (6th Cir. 1968).

Circuit Court of Appeals for the Sixth Circuit in the Jones and Laughlin case * * * that this was an abuse of the discretion permitted to the Board under the Act * * *." 93 Cong. Rec. 6444 (1947). Later in the debates, Senator Taft further explained that "as to plant guards we provided that they could have the protection of the Wagner Act only if they had a union separate and apart from the union of the general employees." 93 Cong. Rec. 6445 (1947).

As the Board noted in reviewing the legislative history in this case (Pet. App. 31a-32a n.9, 33a-34a), although this Court in *Jones & Laughlin* and *Atkins* had focused on the particular cases of plant guards who were also commissioned police officers or members of the military, and hence had an obligation not only to their employer but also to the community, it is clear that Congress was concerned with the problem of divided loyalties among guards generally in enacting Section 9(b)(3). See H.R. Conf. Rep. 510, 80th Cong., 1st Sess. 47-48 (1947); *Teamsters Local 71* v. *NLRB*, 553 F.2d 1368, 1373 (D.C. Cir. 1977). Thus, the Board, with judicial approval, has consistently applied Section 9(b)(3) to armored car security personnel for more than 30 years. See *Armored Motor Services Co., Inc.*, 106 N.L.R.B. 1139, 1140 (1953); *Teamsters Local 851* v. *NLRB*, 732 F.2d 43 (2d Cir. 1984); *Teamsters Local 71* v. *NLRB*, *supra*. Petitioner does not challenge this aspect of the Board's interpretation of Section 9(b)(3) for the purposes of this case (see Pet. 7 n.2).

Against this background, the Board reasonably concluded that Section 9(b)(3) also precludes it from compelling an employer that voluntarily has recognized a mixed guard union to continue recognition and bargaining when it no longer chooses to do so. In this situation, just as in the case of initial recognition, resort to the Board's processes under Section 8(a)(5) would violate the policy protecting employers from the potential conflicts inherent in mixed guard unions. In the words of the court of appeals (Pet. App. 11a), there is "no reasoned basis for a distinction between initial certification and compulsory maintenance of a voluntary relationship. A voluntary relationship cannot change the substance of Section 9(b)(3)." See also Pet. App. 28a. A contrary conclusion would mean that an employer forever waives its statutory protection if it once recognizes such a union voluntarily. Cf. *Pattern Makers' League, AFL-CIO* v. *NLRB, supra* (requiring employees to forfeit their Section 7 right to refrain from concerted activities as a condition of union membership violates the fundamental policies of the Act favoring employee free choice).

2. Petitioners' contention (Pet. 10-17) is that the language of the Act does not support the Board's construction because Section 9(b)(3) in terms precludes only certification of a mixed guard union, and Section 8(a)(5) does not expressly require certification as a prerequisite to the employer's duty to bargain, which attaches upon voluntary recognition based on majority status. Hence, an employer that voluntarily recognizes a mixed guard union is bound by Section 8(a)(5) to continue recognition absent a showing of loss of majority. This technical contention reflects an unduly literal and narrowly focused reading of the statute. This Court has set forth the principle that "[i]n expounding a statute, [the Board] must not be guided by a single sentence or member of a sentence, but look to the provisions of

the whole law, and to its object and policy." *Mastro Plastics Corp.* v. *NLRB,* 350 U.S. 270, 285 (1956) (citation omitted). Applying this principle, the Board correctly concluded that petitioners' literal reading "would thwart [the] congressional purpose" (Pet. App. 34a).

Petitioners' reliance on the principle that, under Section 8(a)(5), an employer who voluntarily recognizes a majority union must continue that recognition absent a good faith doubt of majority status is misplaced. That principle is based on a presumption of continuing majority support coupled with an employer's obligation under Section 8(a)(5) to deal with a union on the basis of majority support *in the first instance.* See *Brooks* v. *NLRB,* 348 U.S. 96, 103-104 (1954). Here, however, by prohibiting certification in Section 9(b)(3), Congress decided that an employer has no such obligation with respect to a mixed guard union (see *NLRB* v. *White Superior Division, White Motor Corp., supra*). In light of this statutory policy protecting an employer's freedom not to recognize a mixed guard union, notwithstanding majority support of the employees, the Board reasonably concluded that Section 8(a)(5) does not compel an employer to continue recognition that it was always free to withhold any more than it compels recognition of a mixed guard union in the first instance.

Petitioners rely (Pet. 19-20) on decisions holding that an employer violates Section 8(a)(5) if it withdraws voluntary recognition from a unit including both professional and nonprofessional employees, even though certification of the unit was improper because the professionals were not afforded a chance to vote on their inclusion as required by Section 9(b)(1), 29 U.S.C 159(b)(1). See *International Telegraph & Telephone Corp.* v. *NLRB,* 382 F.2d 366, 370 (3d Cir. 1967), cert. denied, 389 U.S. 1039 (1968); *NLRB* v. *Cardox Div. of Chemetron Corp.,* 699 F.2d 148, 154-155 (3d Cir. 1983). These cases are inapposite. The professional

employees in those cases consented to their inclusion notwithstanding the lack of an election. It is those employees who were the intended beneficiaries of Section 9(b)(1), 29 U.S.C. 159(b)(1). The denial of *their* right to an election provides no basis for the employer to withdraw recognition of the union. Here, by contrast, the relevant statutory provision was intended to benefit the employer despite the wishes of a majority of the unit employees. The employer's right not to be compelled to recognize a mixed guard union is not eliminated by voluntary recognition. Cf. *Utah Power & Light Co.*, 258 N.L.R.B. 1059, 1061 n.14 (1981) (notwithstanding their voluntary inclusion in a unit with nonprofessionals for 43 years, professional employees were not precluded from asserting their right to an election under Section 9(b)(1)).

Petitioner's reliance (Pet. 14-16) on *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62 (1956), is also misplaced. In that case, the Court held that a state court could not enjoin a union's peaceful picketing for recognition, even though the union was statutorily precluded by former Section 9(f), (g), and (h), 29 U.S.C. (1958 ed.) 159(f), (g), and (h) (repealed in 1959), from invoking the Board's certification processes. The Court concluded that, despite the union's lack of access to the Board because of noncompliance with statutory provisions requiring the filing of certain affidavits concerning communist affiliation, "by virtue of the conceded majority designation of the union, the employer was obligated to recognize the designated union," and therefore the union was entitled to picket for recognition. 351 U.S. at 75. See also *NLRB* v. *District 50, United Mine Workers,* 355 U.S. 453, 461-462 (1958) (noncompliance with Sections 9(f), (g), and (h) does not deny employees' right to select non-complying union as bargaining representative). But the Court made clear that, even though the union could "take other lawful action" such as recognitional picketing, it could not "resort to the Labor

Board" to enforce its status. 351 U.S. at 75.[8] Thus, contrary to petitioners' contention (Pet. 15), nothing in *Arkansas Oak Flooring* suggests that petitioners can resort to the Board in a Section 8(a)(5) proceeding to seek to enforce an obligation to bargain where, as here, the union is ineligible for certification.

Moreover, here the issue involves more than the union's non-compliance, perhaps temporary, with a prerequisite to recourse to the Board's procedures. This case involves a congressional judgment that, whatever the employees' wishes, an employer may not be forced to tolerate the potential for conflict of interest arising from mixed guard union representation. Unlike the situation in *Arkansas Oak Flooring,* the entire thrust of the statute is that the employer here is *not* "obligated to recognize the designated union" (351 U.S. at 75).

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[8]Subsequent to the Court's decision in *Arkansas Oak Flooring,* Congress enacted Section 8(b)(7) to regulate recognitional picketing (see *NLRB* v. *Local 103, Iron Workers,* 434 U.S. 335 (1978)), and this Section has been interpreted to preclude such picketing by unions, including mixed guard unions, barred from certification under Section 9(b)(3). See *General Service Employees Local No. 73* v. *NLRB,* 578 F.2d 361, 370-372 (D.C. Cir. 1978); *Teamsters Local 851 (Purolator Courier Corp.),* 268 N.L.R.B. 452, 453 (1983), enforced, 732 F.2d 43 (2d Cir. 1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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